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Cannon Reinstatement Statute Declared Unconstitutional

THE Supreme Court of Wisconsin, in an opinion by Mr. Justice Owen, has declared unconstitutional the act of the State Legislature purporting to reinstate Mr. Raymond J. Cannon as a member of the Bar, and to remit costs imposed upon him in a disbarment proceeding before the Supreme Court. A brief statement of pertinent facts in the case is contained in the September, 1931, issue of the JOURNAL under the title, "Extraordinary Situation in Wisconsin." The wider significance of the proceeding is indicated sufficiently in the statement of Mr. Justice Owen, in the opinion just handed down, that "this statute presents an assertion of legislative power without parallel in the history of the English-speaking people so far as we have been able to ascertain."

It had been suggested to the court that it should not consider the constitutionality of the statute unless it found it absolutely necessary to do so—"this in obedience to the general reluctance of courts to declare statutes unconstitutional and to face such questions only under imperative circumstances." To which it replied in language wholly worthy of a court: "We are impressed with the thought that it would be a very weak response to the responsibility imposed upon this court if it sought a way to avoid the determination of this question, involving as it does the respective powers of coordinate branches of the government. We do not fail to appreciate the delicacy in considering a disputed question involving legislative and judicial power. We easily subject ourselves to the criticism of usurping power where by our decision the power is committed to the judicial rather than the legislative department of government. However, we may as easily subject ourselves to the criticism of timidity were we to betray a disposition to avoid responsibility. The usurpation of power is not more culpable than the abdication of responsibility."

The opinion concedes the right of the legislature, acting under the police power to promote the welfare of the citizens of the State, to "exact of those who desire or assume to practice law such qualifications as in the judgment of the legislature are necessary to protect the citizens of the state from becoming unconscious victims of dishonesty and incompetence." But it maintains that when the legislature has thus acted, the power of the courts to impose other and further exactions is neither foreclosed nor exhausted; and it proceeds to renew the history of the relation of the courts and Bar in England from earliest times, citing many actual cases as illustrating the power of the English courts to say who shall practice before them. After quoting from one of these—*Matter of the Sergeants at Law,* 6 Bingham's New Cases, p. 235, the opinion by Mr. Justice Owen says:

"This opinion plainly puts the power of the court to designate those who should appear before it beyond the power of any interference short of that of the whole legislature, which, as has already been stated, finds analogy in this country only in a constitutional provision. It may be stated further, more as a matter of interest than as having any particular bearing upon our question, that on the 18th day of August, 1846, Parliament enacted c. 54, 9 & 10 Vict., extending to all barristers practicing in the Superior Court of Common Law at Westminster the privileges of Sergeant at Law in the court of Common Pleas. The act recites that 'Whereas, it would tend to the more equal Distribution and to the consequent Dispatch of Business in the Superior Courts of Common Law at Westminster, and would at the same Time be greatly for the Benefit of the Public, if the right of Barristers at Law to practice, plead, and to be heard extended equally to all the

said Courts; but by reason of the exclusive Privilege of Sergeant at Law to practise, plead, and have Audience in the Court of Common Pleas at Westminster during Term Time, such object cannot be effected without the Authority of Parliament.' Here it appears again that Parliament was induced to its actions by considerations of public welfare, and that it justified its interference with the internal affairs of the Court or the relations existing between the Court and its Bar only for the purpose of promoting the dispatch of business in the realm. Furthermore, it is a tacit recognition of the fact that no power short of an act of Parliament was sufficient for the accomplishment of that purpose, which, as already stated, is no authority for saying that such power constitutes purely legislative power, or that such power resides in our legislature by reason of the fact that it is the repository of mere legislative power.

"But from what has been said, the limit of control which the courts of England exercised over their attorneys has not yet been stated. The extent of that control finds further elucidation in the opinion of Chief Justice Cardozo in *People ex rel. Karlin v. Culkin,* 248 N. Y. 465, at p. 474 (162 N. E. 487), where he points out that the courts of England exercised the power of conducting general inquisitions into the general conduct of their attorneys and that in Easter Term, 9 Eliz. 1567, the lord chief justice charged a jury to inquire into the 'falsities, erasures, contempts and misprisions' practiced generally by the attorneys of that court. The inquisition there conducted seems to have been quite similar in nature to the one upheld as within the power of the court in *Rubin v. State,* 194 Wis. 207, 216 N. W. 513, and in *People ex rel. Karlin v. Culkin, supra.* This power of regulation and disbarment was exercised by the English courts in the absence of any power expressly conferred by an act of Parliament. It was plainly a power exercised by the courts as necessary and proper to enable the court to discharge its functions. While Parliament spoke at least twice (c. 18, 4 Henry IV; c. 54, 9 & 10 Vict.) with reference to the matter of admission to practice before the courts, it was in one instance to consummate a limitation upon that right, and in the other to extend the right, but in both instances the necessity therefor was deemed to exist by reason of public conditions, and when Parliament did speak it was comparable to the voice of the people of this country assembled in the constitutional conventions.

"With this background, we find that the people in this state, in constitutional convention assembled, provided by sec. 2, Art. VII, Const., that the 'judicial power of this state, both as to matters of law and equity, shall be vested in a supreme court, circuit courts, courts of probate, and in justices of the peace.' No effort is made to define the term 'court.' It simply speaks of courts. At that time courts were understood to mean certain governmental institutions possessing certain powers which distinguished them from mere referees or debating societies. They had power to enforce order in the court, power to compel the attendance of witnesses, power to compel witnesses to testify, and power to enforce their orders. The constitution does not speak of the powers of courts. It does speak of their jurisdiction, but not of their powers. In the same manner the constitution speaks of trial by jury, but it does not attempt to define the term 'jury.' It is settled that the trial by jury contemplated by the constitution was the trial by jury known to the common law. *Malinowski v. Moss,* 196 Wis. 292, 220 N. W. 197. So when the term 'court' is used in the constitution it is plain that the framers had in mind that governmental institution known to the common law possessing powers characterizing it as a court and distinguishing it from all other institutions. This power has been referred to by all legal scholars and writers as the inherent power of courts. That courts possess inherent power, as has frequently been asserted by this court, was pointed out in *State v. Cannon,* 196 Wis. 534, 221 N. W. 603. The dissenting opinion of Mr. Justice Crownhart in that case has evidently provoked a debate upon whether the power of the court to disbar a lawyer is inherent or implied. The controversy seems to be a controversy over names and not powers. Both opinions in the *Cannon Case* concede the power of the court in the premises, and when the power is conceded the matter of its proper designation may afford an intriguing subject for mental sparring; but whether it be called implied or inherent results in no substantial difference to the citizen or to the rights and liberties of our people. No one entertains the thought, whether it be called inherent or implied, that it is a power which transcends the constitution. It is a power which may be taken away by the constitution, just as all courts may be abolished by the constitution. No mere creature of the people can rise above the people in importance, dignity, or power. The statement in the opinion that it was a power that existed independent of the constitution merely meant that it was a power which inhered in the courts established by the constitution and existed by reason of their creation, independent of any affirmative power expressly conferred by the constitution. It is difficult to see why the designation of this power as inherent constitutes a greater threat upon the liberties of the people than to designate it as implied power. The power means the same to those who call it implied as it does to those who call it inherent, and whether it be called implied or inherent is quite immaterial, except to those having a refined instinct for exactitude of expression.

"In the most excellent brief of the assistant attorney general it is conceded that courts have many implied powers, but he expresses the view that in the *Cannon Case, supra,* rather extreme views were expressed as to the inherent powers of courts, and he professes to see a retraction of these views in the language used in *State v. Cannon,* 199 Wis. 401, 226 N. W. 385, to the effect that these powers are known as 'incidental, implied or inherent powers, all of which are used to describe those powers which must necessarily be used by the various departments of government in order that they may efficiently perform the functions imposed upon them by the people.' The expression in the latter case was rather used to indicate the inconsequentiality of the use of either term, and left the individual free to designate the power by any term that seemed more pleasing. It was a concession of nomenclature and not of substance.

"The assistant attorney general prefers to call the power implied power, and then argues that the power cannot be implied from our constitution, because all judicial power is not conferred on the courts by the constitution. He dwells upon the fact that it is the judicial power only 'in matters of law and equity' that is conferred upon the courts, and quotes from *State ex rel. Ellis v. Thorne,* 112 Wis. 81, 87 N. W. 797, where it is said: 'The constitution by no means provides that all authority to act judicially is or shall be vested in some one of the courts therein indicated. . . . The term "matters of law and equity" refers

to the administration of the law in actions and proceedings in courts of law and equity,—the exercise of such power in such matters as was exercised by such courts at the time of the adoption of the constitution.'

"With this we agree, and we admit that courts have no concern with the qualifications of lawyers except in so far as they are permitted to participate in the administration of the law in actions and proceedings in courts of law and equity. If the legislature desires to classify attorneys at law, we are free to say that courts would not be concerned with the qualifications of those permitted to perform legal services or to give legal advice which has nothing to do with the administration of the law in actions and proceedings in courts of law and equity. The legislature may establish such qualifications as it chooses for those who are permitted to act as conveyancers, examiners of title, organizers of corporations, or any other type of legal services which does not give them power to influence the course of justice as administered by the courts. It seems unnecessary for us to review the many cases which may be cited bearing upon the question of the right of the legislature to prescribe qualifications for those who shall be admitted to the practice of the law. They are exceedingly numerous, some of which have grappled with the question in a fundamental and helpful way while others have given it but superficial consideration. No doubt the leading case in this country holding that the legislature may prescribe the ultimate qualifications for admission to the bar is *In re Cooper,* 22 N. Y. 67. It must be conceded that that is a well-considered case, but it has not been generally followed in this country, and apparently is not regarded as settling the matter in New York, as we find an expression in *People ex rel. Karlin v. Culkin,* 248 N. Y. 465, 162 N. E. 487, that 'the question does not now concern us whether the power may be withdrawn or modified by statute (*In re Cooper,* 22 N. Y. 67, 68),' a quite unnecessary statement if it were thought that the *Cooper Case* settled the question. Neither does our present examination of the question impress us with the soundness of the conclusion reached in the *Cooper Case.*

"Our conclusions may be epitomized as follows: For more than six centuries prior to the adoption of our constitution the courts of England, concededly subordinate to Parliament since the Revolution of 1688, had exercised the right of determining who should be admitted to the practice of the law, which, as was said in *Matter of the Serjeants at Law,* 6 Bingham's New Cases, 235 'constitutes the most solid of all titles.' If the courts and the judicial power be regarded as an entity, the power to determine who should be admitted to practice law is a constituent element of that entity. It may be difficult to isolate that element and say with assurance that it is either a part of the inherent power of the court, or an essential element of the judicial power exercised by the court, but that it is a power belonging to the judicial entity cannot be denied. Our people borrowed from England this judicial entity and made of it not only a sovereign institution, but made of it a separate, independent, and co-ordinate branch of the government. They took this institution along with the power traditionally exercised to determine who should constitute its attorneys at law. There is no express provision in the constitution which indicates an intent that this traditional power of the judicial department should in any manner be subject to legislative control. Perhaps the dominant thought of the framers of our constitution was to make the three great departments of government separate and independent of one another. The idea that the legislature might embarrass the judicial department by prescribing inadequate qualifications for attorneys at law is inconsistent with the dominant purpose of making the judicial independent of the legislative department, and such a purpose should not be inferred in the absence of express constitutional provision. While the legislature may legislate with respect to the qualifications of attorneys, its power in that respect does not rest upon upon any power possessed by it to deal exclusively with the subject of qualifications of attorneys, but is incidental merely to its general and unquestioned power to protect the public interest. When it does legislate fixing a standard of qualifications required of attorneys at law in order that public interests may be protected, such qualifications constitute only a minimum standard and limit the class from which the court must make its selection. Such legislative qualifications do not constitute the ultimate qualifications beyond which the court cannot go in fixing additional qualifications deemed necessary by the courts for the proper administration of judicial functions. There is no legislative power to compel courts to admit to their bars persons deemed by them unfit to exercise the prerogatives of an attorney at law. The power of the court in this respect is limited only to the class which the legislature has determined as necessary to conserve the public welfare. . ."

The opinion then goes on to hold that the statute is invalid for another reason. Even granting that the legislature has power to prescribe ultimately and definitely the qualifications of those who practice law, this power "must be exercised through general laws which will apply to all alike and accord equal opportunity to all"—which the Cannon statute did not do. Furthermore it is an unlawful attempt to exercise the power of appointment, and therefore void. If other grounds of invalidity are needed, it is supplied by the court in its declaration that the effect of the act was to nullify and set aside a judgment of the court—which is beyond the constitutional power of the legislature. Cases are cited in support of these holdings.

This brought the court to a consideration of what it was to do with Mr. Cannon's petition for reinstatement. It reviewed his conduct since the first order was entered and concluded that it could not refuse to reinstate him because of his indulgence in criticism of the courts, no matter how unfounded it might be. But this left the matter of character and fitness to be passed on. After pointing out what it regarded as certain plain defects in this respect, the court concluded:

"It must be conceded that he has many traits of character not commendable on the part of those who act as ministers of justice. We should give serious consideration to the question whether, as an original applicant for admission to the bar, these obvious weaknesses in Mr. Cannon's character should be overlooked. We think that under the circumstances he should not be subjected now to the same rigid test that would be applied in the case of an original applicant. He has practiced law fourteen years. He has arrived at a time of life when it would be difficult for him to accommodate himself to any other means of livelihood. He has a family dependent upon him for support. He has suffered the penalty which the court imposed upon him for the offenses of which he was convicted. He has given assurances that he will henceforth be governed by the established ethics of the profession. His attorneys, who stand high in the regard of this court, are evidently convinced of the sincerity of his professions. The Governor, a lawyer of high ideals, in sign-

ing the act purporting to reinstate him, expressed the view that, while his conduct could not be approved, he had probably learned his lesson. The legislature, by the passage of the act purporting to restore him to practice, has at least manifested its belief in his fitness for the office. It must be that his experience has in some degree had a modifying influence upon his imperious attitude and impressed him with the necessity of obedience to constituted authority, and brought about some regeneration of character. Although the only evidence of such regeneration is to be found in his verbal assurances that he will henceforth demean himself in accordance with the ethics of the profession, we have concluded, somewhat doubtfully, we must confess, to give him another chance. We have concluded that he may be reinstated and placed in a position where he will have an opportunity to give substantial evidence of his professions, and thus justify the confidence reposed in him by his attorneys, the legislature, and the governor. Our action in this respect is accompanied by the hope that he will improve his opportunity to become an honorable and respected member of the bar.

"But before he can be reinstated he must pay the judgment for costs which was assessed against him in the original case. While the act of the legislature purported to remit those costs, this attempt was also plainly beyond the jurisdiction of the legislature as an unwarranted interference with the judgment of this court. . . ."

The importance of the case is indicated by the number and eminence of counsel engaged: Messrs. William A. Hayes of Milwaukee and Henry Lockney of Waukesha acted for the applicant. Spencer Haven of Hudson was special counsel for the Board of State Bar Commissioners. For the State there were briefs by the Attorney General and J. E. Messerschmidt, assistant attorney general, a supplemental brief signed by Fred M. Wylie, deputy attorney general, and oral argument by Mr. Messerschmidt. There were also briefs, as *amici curiae*, signed by J. G. Hardgrove of Milwaukee; by Maxwell H. Herriott of Milwaukee, and Lines, Spooner & Quarles of Milwaukee of counsel; by the Judicial Committee, State Bar Association; and by George A. Affeldt, Carl B. Rix, Albert B. Houghton, Hubert O. Wolfe, John F. Baker, George P. Ettenheim, Joseph E. Tierney, and William A. Klatte, members of the executive committee of the Milwaukee Bar Association, and Irving Fish and Walter H. Bender of counsel, all of Milwaukee.

Rhode Island Judicial Council Makes Recommendations

THE Fifth Report of the Judicial Council of the State of Rhode Island and Providence Plantations, submitted to the Governor December, 1931, proposes certain Rules of Court and recommends an entry fee of $5 in the Superior Court "for the following cases of original entry—actions at law, bills or petitions in equity and for divorce, and miscellaneous petitions other than petitions for a writ of habeas corpus." It also recommends that "parties be allowed to try civil cases to a jury of six, if the parties so desire, and that a jury fee of $10 be paid in civil cases by a party when claiming trial by a jury of twelve persons." These provisions, along with trial by the Court alone of cases in which the jury trial is not desired and so not claimed—which is already in effect on recommendation of the Council—are said to "offer the best prospect of reducing the cost to the State of one of the largest items in the cost of the Courts." Bills to carry these regulations into effect have been drawn up and are submitted as a part of the Council's report.

The constitutional questions involved in the recommendations are briefly considered. Statutes imposing entry fees have been upheld in the State and various decisions cited leave no question as to the jury fee. The constitution of Connecticut has the same provision as the constitution of Rhode Island that "the right of trial by jury shall remain inviolate," and a statute passed in the former State in 1888 providing for a jury of six was held constitutional. "In view of this decision," says the report, "and the existence of the present statute [Conn. Gen. Lt. 1930, Vol. 2] providing for trial by a jury of six, there seems little question as to the validity of such a jury for the trial of small cases at least. Such juries were authorized at an early date."

"But whether constitutional or not," the report adds, "it is probably inexpedient to require parties to submit to trial by a jury of six, but there can be no harm in offering parties a choice of trial by a jury of six. Civil cases are not uncommonly tried by less than a jury of twelve, by agreement of the parties, and when a full panel is not available parties sometimes agreed to a trial by ten or eleven jurors. This is current practice in this State. Certainly if a party may waive trial by jury altogether he may waive trial by a jury of twelve and accept a jury of a less number, in both civil and criminal cases."

The Rules of Court submitted for consideration of the Justices of the Superior Court are for the examination of adverse party prior to trial; providing that "decisions, rulings and orders of the Superior Court upon any matter subsequent to judgment, may be excepted to and may be made the subject of a bill of exceptions in the same manner, as near as may be, as decisions, rulings and orders prior to judgment; and for calling for cases in which no trial is to be had, with the object of preventing delay and promoting the speedy determination of litigation on the merits. The first proposed rule follows the report of the Council last year, in which it pointed out the need for some method of discovery at law and called attention to the fact that "the present statute (General Laws, Chapter 342, Section 50) provides for the production and examination of documents in the possession or control of an adverse party, but makes no provision for the discovery of facts, although the facts are necessary to the proof of the other party's case." The second proposed rule is due to the fact that, although the method of appeal in civil actions in the State is by bill of exceptions, the statute makes no express provision for the taking of exceptions to rulings and decisions made after judgment. "The Court," says the Council, "has reviewed upon a bill of exceptions, rulings and decisions of the Superior Court made after entry of judgment, and the ground for the refusal to review in other cases is the failure of the statute to make express provision for it . . . It is highly desirable that the procedure should be as simple and uniform as possible. Bills of exception afford the usual and customary method of review and this method is to be preferred to the more cumbersome and less used, therefore less familiar, review by certiorari or other extraordinary process."

The proposed rule, if adopted, is expected to meet this situation.

There is an appendix of "Statistics of the Courts," showing the general increase of litigation and other pertinent matters. The report is signed by Elmer J. Rathbun, Chairman of the Council; Charles A. Walsh, Max Levy, George H. Huddy Jr., Francis B. Keeney and Harold B. Tanner.

Study of New Jersey and Boston Bankrupts

THE results of a study of fifteen hundred New Jersey and Boston bankrupts, undertaken by the Yale Law School, the Institute of Human Relations of Yale University and the United States Department of Commerce, are announced in a report by Prof. William O. Douglas published in the January issue of the Yale Law Journal. Prof. Douglas is Visiting Professor of Law on the Sterling Foundation of Yale.

According to a digest of the findings furnished to the press, the rising tide of bankruptcies in the United States is accounted for in five ways. "The bankruptcies in New Jersey and Boston are declared to have been due chiefly to failure to keep books; speculation or gambling; contracting debts without having, at the time, reasonable grounds of expectation of being able to pay them; culpable neglect of business; and inability to meet claims for personal or property damage arising out of automobile accidents. Gross extravagance, fraud, and 'excessive optimism' entered into the factors contributing to some of the bankruptcies, and 'hopeless ignorance' was discovered in the cases of some who contracted to make payments on purchases in monthly amounts that exceeded their income.

"Professor Douglas points out that in this country, the court has only one of two alternatives in dealing with discharges from bankruptcy—to grant or to refuse. In England, the court may refuse the discharge; grant it conditionally or unconditionally; or suspend the discharge for an indefinite period as it thinks proper. Data taken from the annual reports of the Board of Trade of that country for the years 1924-1929 show that 5,520 discharges were disposed of finally. Of these, 140 (2.7 per cent) were granted; 157 (2.8 per cent) were refused; 1,268 (22.9 per cent) were conditional discharges; and 3,955 (71.6 per cent) were suspended.

"Data showing the disposition of cases under the discharge section of the Bankruptcy Act in this country are not available, the report says, but a preliminary announcement of a recent study by the Department of Justice shows that in cases filed between September 1, 1926 and March 1, 1929, 85,252 bankrupts were granted a discharge, and 776 were denied a discharge. In the cases closed during the fiscal year ended June 30, 1930 approximately 37,277 bankrupts (non-corporate) were granted a discharge and approximately 319 (non-corporate) were denied one. About 98 per cent of the mercantile bankrupts who asked for a discharge were granted it. In case of non-mercantile bankrupts 99½ per cent received the discharge. In wage-earners cases only .004 per cent were denied the discharge.

"'The criticism frequently has been made that discharges are granted all too freely,' Prof. Douglas says. 'Defects in the present statute have been made apparent. The opposition to a discharge is a matter of private initiative of the creditors and their lethargy is notorious. If there is no opposition the court has no discretion but to grant the discharge. Certainly it seems clear that additional supervision over the dispensing of discharges is needed.'

"Many bankrupts failed to keep proper records, the report shows. 'The importance to business management of adequate accounting records cannot be denied,' Professor Douglas says. 'The use of an adequate accounting system not only provides the manager with an accurate survey of the past but enables him to evaluate the influence of various factors upon the future course of the business. With this source of data he can undertake to eliminate or minimize unfavorable factors and encourage or foster favorable ones. This use is most sharply outlined in the control of expenses. In case of an unprofitable or nearly unprofitable business it is the vital one. It is obvious that the presence of even the best of accounting systems does not assure either its proper use or the success of the business. On the other hand the presence of an adequate one may be assumed to be an earmark of progressive and efficient management. Conversely the presence of an inadequate system or the absence of any system (while perhaps not being an unmistakable earmark of failure) would seem to be indicative of the absence of a management necessary to ensure success.'"

Bar Association of Saint Louis Has Dinner in Honor of President Thompson

ON Saturday evening, January 16, 1932, The Bar Association of St. Louis tendered to Hon. Guy A. Thompson, President of the American Bar Association, a testimonial dinner in evidence of the high esteem in which he is held by the Bench and Bar and citizens of his home city. Over six hundred attorneys, judges of the State Supreme Court and the Missouri Appellate Courts, jurists of the United States Courts, numerous representatives of civic organizations and representatives of the Missouri Bar from outside St. Louis, and of the American Bar Association from all parts of the country were present. It was one of the largest assemblies ever held by the lawyers of St. Louis and crowded the large Gold Room of the Jefferson Hotel.

Judge Kimbrough Stone, of Kansas City, presiding judge of the United States Court of Appeals for the eighth circuit and a classmate of Mr. Thompson's at the Missouri State University, paid tribute to the guest in words of deep and thoughtful meaning. Then John S. Leahy, President of The Bar Association of St. Louis, as toastmaster, expressed the thought of the assembly towards the guest of the evening by saying the lawyer prizes the respect and friendship of his fellow lawyer more than any other earthly compensation, and that in times of depression the people generally were beginning to realize that the esteem of their fellow man was the highest and most acceptable permanent reward in life. Following these speakers, Judge Berryman Henwood, of the Missouri Supreme Court, Judge O'Neill Ryan, of the St. Louis Circuit Court, Judge Charles W. Holtcamp, of the St. Louis Probate Court, and Boyle G. Clark, of Columbia,

President of the Missouri Bar Association, also paid tribute to the guest of the evening.

Judge William Dee Becker, of the St. Louis Court of Appeals, was chairman of the committee in charge of the testimonial. Mr. Thompson was presented with a watch, on which was inscribed, "In token of the sincere congratulations of members of the Bar Association of St. Louis upon his becoming President of the American Bar Association."

Mr. Thompson, in response to the high commendations paid him on this occasion, said that words could express all the learning of the ages, but could not convey the appreciation he felt for the good will and friendship of his fellow lawyers. He declared the honor he held was territorial, not personal, and spoke at length on what the organized bar of this country was doing for the advancement of the profession and the welfare of our institutions.

Virginia Judicial Council Recommends Legislation

NUMEROUS recommendations for legislation, together with drafts of Bills to carry them into effect, are contained in the last report of the Judicial Council of Virginia. Of special general interest is the measure, recommended by the committee of the Virginia State Bar Association on Legal Education and Admission to the Bar, also approved by the Judicial Council, which amends the existing statute so as to give the Virginia Board of Law Examiners the right to prescribe rules and regulations relating to the academic and legal education required of applicants for admission. The present law only gives the Board power to make regulations as to the "legal qualifications" of such applicants, which is obviously a much more limited authority. Another proposed measure provides for adequate compensation for members of the Board and for necessary expenses incurred in the discharge of their duties.

Perhaps the measure which the Council stresses most is that for the extension of the system of "trial justices" to counties in the state still operating under the old justice of the peace plan. "It will be recalled," says the report to the legislature, "that the Council, in its report to the General Assembly in 1930, recommended the adoption of the compulsory trial justice system. The Council again urgently recommends the creation of this system in every county in this Commonwealth, believing that it will add strength to a weak part of our judicial machinery, and that the expense and cost thereby incurred will be far more than offset by its services to the people of Virginia. In those counties (about twenty in number) where the system already prevails, it has been found that, with the fees going into the treasury of the county, the cost of the system is no great burden, if any, upon the county treasury." The tentative draft bill is long and goes fully into the jurisdiction of the trial justices and other details of the system.

Humanitarian ideas are evidenced by the proposed measure relating to prisoners on the State convict road force, presumably raising the rate paid for each day of compulsory labor; also by another measure, relating to confinement in jail until fine and costs, or costs, are paid, and fixing a moderate limit for such imprisonment, dependent on the amount of fine and costs involved. The proposed measures, such as those for the apportionment of taxes between life tenants and remaindermen, selection and peremptory challenge of jurors, relating to striking cases from the court docket in the court's discretion, where for more than two years there has been no order or proceeding, except to continue it, relating to compensation for live stock and poultry and treatment of rabies, etc., seem to be of less general interest.

Chief Justice Robert R. Prentis is Chairman of the Council, which also includes Circuit Judges Allan R. Hanckel, A. C. Buchanan and Philip Williams; City Court Judges William A. Moncure and Henry C. Leigh, and Attorneys B. Frank Buchanan, Wilbur C. Hall, James Elliott Heath and John S. Eggleston.

American Bar Association, Committee on Commerce

Annual Meeting to Be Held in New York Tuesday, Wednesday and Thursday, April 12, 13 and 14, 1932

THE Committee on Commerce of the American Bar Association will hold public meetings in the building of the Chamber of Commerce of the State of New York, 65 Liberty Street, New York City, Tuesday, Wednesday and Thursday, April 12, 13 and 14, 1932, for hearing discussion of and recommendations concerning the subjects appearing upon the agenda or that may be appropriately added thereto.

The Committee cordially invites all persons interested in any of the subjects mentioned to attend its meetings either in person or by representative, and to submit written suggestions.

RUSH C. BUTLER, Chairman.

Feb. 1, 1932.

AGENDA

Tuesday, April 12

10:00 A. M.:
1. Suggestions of new subjects.
2. United States Contract and Sales Bill.
3. Bill providing for payment of interest on judgments rendered against the United States.
4. Bill relating to motor vehicles used in interstate commerce.
5. Revision of the Calendar.

2:00 P. M.:
6. Encroachment by Government on Domain of Private Business.

Wednesday, April 13

10:00 A. M.:
1. Proposed amendment to Federal anti-trust laws.

2:00 P. M.:
2. Proposed amendment to Federal anti-trust laws.

Thursday, April 14

10:00 A. M.:
1. Resale prices—Capper-Kelly bill.
2. Amendments to Federal arbitration law.
3. Bills of lading for carriage of goods by sea.

2:00 P. M.: Executive Session.

Arrangements for the Fifty-Fifth Annual Meeting

Washington, D. C., October 10-15, 1932

Section Meetings, Monday and Tuesday, October 10 and 11.

General Sessions, Wednesday, Thursday and Friday, October 12, 13, 14, 1932.

Annual Dinner Saturday evening, October 15.

HEADQUARTERS: Hotel Mayflower, Connecticut Avenue.

Hotel accommodations are available as follows:

	Single (For 1 Person)	Double (For 2 Persons)	Twin Beds (For 2 Persons)	Parlor Suites
Carlton	$5-6-7	$8	$9-10	$15-20-25
Hay-Adams	$4	$6-8	$10	$12 and up
Mayflower	$5-6-7	$7-8-9	$8-9-10-12	$17-18-22-24 for 2 persons ($2 less for 1)
Powhatan	$3.50-4-5	$6	$7-8	$12-15
Raleigh	$3.50-4-5	$5-5.50-6.50	$7-8-9	$12
Shoreham	$5	$10	$8	$12-15
Washington	$5-6	$7-8	$8-10	$18 and up
Willard	$4-5-6	$6-7-8	$8-9-10	$17 and up

Reservations will be made at other Washington hotels upon request.

Explanation of Type of Rooms

A single room contains a single or double bed to be occupied by one person. A double room (same type as mentioned in preceding paragraph) containing a double bed may be occupied by two persons, at an additional charge of $2.00.

A twin-bed room contains two single beds to be occupied by two persons. A twin-bed room will not be assigned for occupancy by one person.

A parlor suite consists of parlor and communicating bedroom containing double or twin beds. Additional bedrooms may be had in connection with parlor.

Each and every room has tub and/or shower bath.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservations, stating hotel desired, number and rate for rooms required, names of persons who will occupy the same, and arrival date, including definite information as to whether such arrival will be in the morning or evening.

Reservations should be made as early as possible. Requests should be addressed to the Executive Secretary, 1140 North Dearborn Street, Chicago, Illinois.

National Conference of Commissioners on Uniform State Laws

The next Annual Meeting of the Conference will be held at the Hotel Mayflower, Washington, D. C., beginning Tuesday, October 4, 1932. Applications for hotel reservations should be made to the Executive Secretary of the American Bar Association, 1140 North Dearborn Street, Chicago, Illinois.

GEORGE WASHINGTON AS A JUDGE AND HIS ATTITUDE TOWARDS COURTS AND LAWYERS

In All That Has Been Written about Washington the Fact Has Not Been Stressed That He Was One of the Judges of a Court Possessing Extensive Jurisdiction and Inevitably Profited by the Contacts and Information Incidental to That Service—County Court in His Time the Most Important Tribunal in Virginia—His Work as One of the "Gentlemen Justices," Etc.

By Hon. R. Walton Moore

Former President of Virginia Bar Association and Former Member of House of Representatives from the Mt. Vernon District

WASHINGTON was through with school in the ordinary sense of the term when, about fifteen years old, he took up his residence with his brother at Mount Vernon. In a letter to his mother attributed, perhaps mistakenly, to Lord Fairfax, the writer was correct in saying "his education might have been bettered," but correct in predicting, on the basis of his estimate of the youth's unusual qualities, that he "would go to school all his life and profit thereby." In that way certainly no one of the time had more opportunity or was a more intelligent and receptive student. Much has been written of how he was thus trained at almost every step for the great tasks which awaited him, for example by his service as a young surveyor in a wild and thinly settled region, as a young soldier in the frontier wilderness, as a member of the Colonial House of Burgesses, and a member of the Continental Congress.

But the fact seems not to have been at all stressed that for years he was one of the judges of a court possessing extensive jurisdiction, and inevitably profited by the contacts and information incident to that service. While it is mainly the present purpose to say something about that one element of the education which the Fairfax letter predicted for him, a further word or so may be permitted with respect to his protracted legislative career as a Burgess during the period from 1759 to 1775 and as a Delegate to the first and second sessions of the Continental Congress. In the House of Burgesses his associates were his ablest and most accomplished Virginia contemporaries, and in Congress the most eminent men of the thirteen colonies. Of course not as a speechmaker, but by his industry and wisdom he won the admiration and confidence of his colleagues. Convincing proof of this is that in 1774 the House selected him as one of the seven delegates to the first Congress. He was placed in distinguished company. The others were Benjamin Harrison, Richard Henry Lee, Richard Bland, Peyton Randolph, Edmund Pendleton and Patrick Henry, the last three remarkable lawyers. As to how he was regarded in Congress there is the testimony of Henry, who was destined to be offered by President Washington the post of chief justice of the supreme court. Henry, answering an inquiry, said: "If you speak of eloquence, Mr. Rutledge of South Carolina is by far the greatest orator, but if you speak of solid information and sound judgment, Colonel Washington is unquestionably the greatest man on that floor."

A recent writer says that when Washington returned to Mount Vernon in 1758, after British rule had been pretty firmly established in the West, he led "the quiet life of a country gentleman." But the life of a man could not have been very quiet who, besides his legislative duties, closely looked after his own large estate and the large estates of his wife and stepson, was busy with the affairs of the church as an energetic member of the Vestry of his parish at a time when it had serious official responsibilities, who traveled much in and out of Virginia, and was exceptionally active in political and social relations with the influential people of the colony. Added to all this it is clear that not later than the spring of 1768 and thence on until the outbreak of the Revolution, he was a justice of the peace and as such not only charged with disposing of minor cases, but along with other justices was engaged in conducting the business of the county court of his county. As one may see from the court minutes they were invariably when holding court styled "gentlemen justices." Due to the loss of colonial records showing the appointment of justices and the absence here of information understood to be available in England, where there are copies of those records, it is not possible at this moment to determine the precise date when Washington's judicial career started. But there remain two of the Fairfax county court order books covering the period from 1770 to 1775 which, if there were no other reason, are worth examining as an example of the beautiful and still perfectly clear writing of the old time clerks who wrote up the minutes of the court proceedings.

From these two books it appears that Washington served in the court from 1770 to 1774. It is otherwise shown, however, that his service began prior to 1770, for turning to the first volume of his Diaries, which give bare facts with little or no comment, there is this entry under date of April 18, 1768: "Went to court and returned in the evening." Then follow at intervals more than twenty such entries. Now and then they show that the sessions of the court ran several days. For instance, on June 20, 1769, having been at court the day before, the entry is: "Went up to court again and returned in

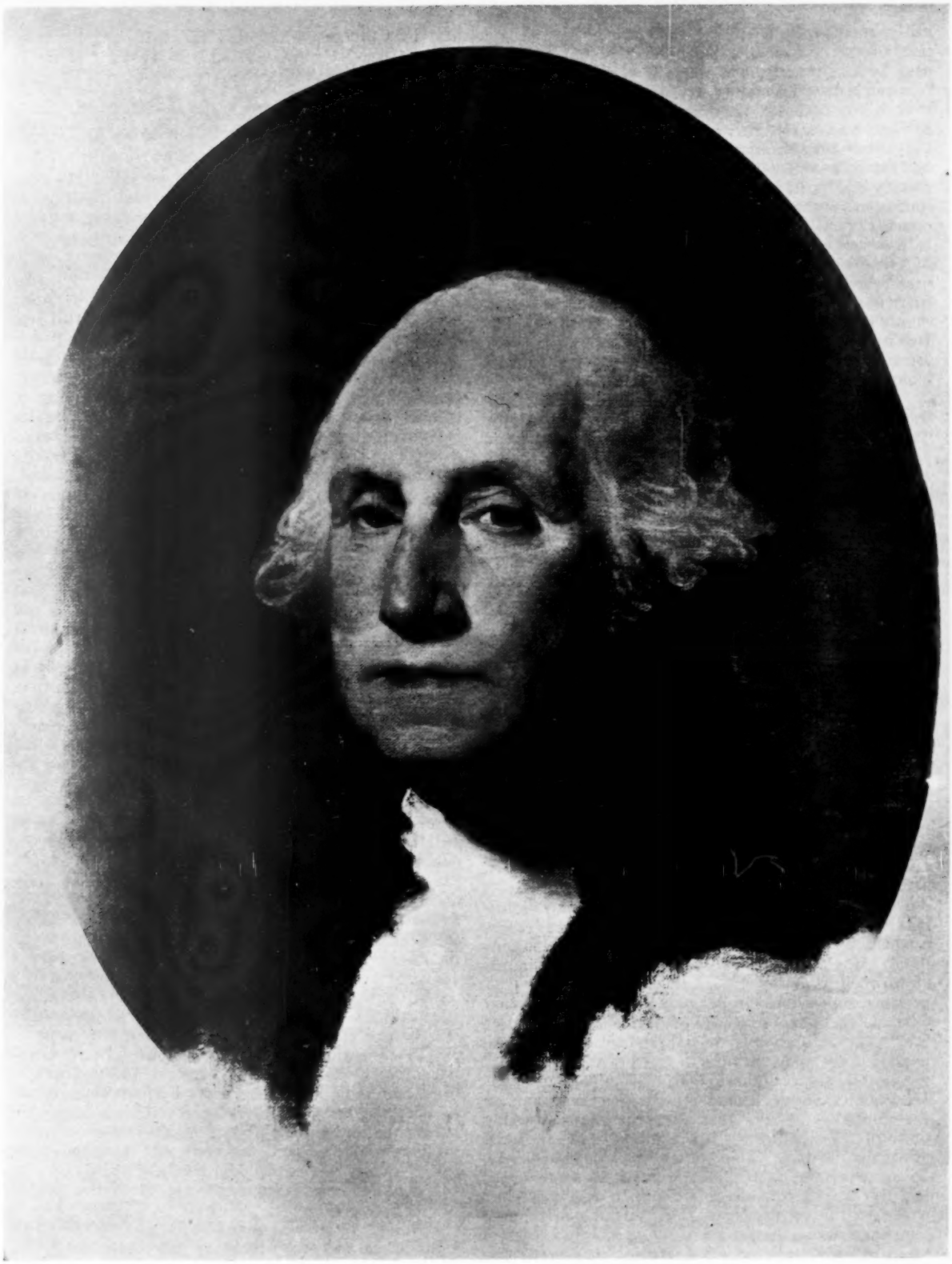
the evening with Colonel Mason, Mr. Scott and Mr. Bryan Fairfax," all of whom were justices. Mason, as we all know, was the author of the Virginia Constitution of 1776 which included the Bill of Rights, this the first instrument ever written and promulgated which set up a complete system of government. Though not a practicing lawyer he was deeply versed in the history and philosophy of the law. He was Washington's near neighbor and friend and one of his most trusted advisors. For instance, the day and evening before the famous Fairfax Resolves were adopted by the citizens of Fairfax in 1774, he and Washington in conference at Mount Vernon agreed on the elaborate statement of the grievances and rights of the colonists which was embodied in the Resolves, and the next day went from Mount Vernon to the meeting at the county seat in Alexandria at which Washington presided. The last entry in the Diaries relative to the court is June 17, 1774, subsequent to which date Washington was doubtless too much engrossed by affairs affecting the entire country to have much time for local matters.

Along with Mason the 1774 meeting had the benefit of the presence of Robert Hanson Harrison, a learned lawyer who was a leader of the Bar of Fairfax County while Washington was a member of the court. In many a case he had seen Harrison's character and ability tested and he singled him out as one of a group of great lawyers, among them Marshall and Hamilton, on whom at various stages of his career he was accustomed to rely when the most dependable counsel was needed. Harrison was not only at his side when the Resolves flung defiance at the Crown, but at his side as a member of his staff during the Revolution, and when he became President he commissioned him as one of the original appointees to the Supreme Court. Turning again to the Diaries there is found this interesting entry dated February 6, 1790: "The resignation of Mr. Harrison as an associate judge (he declined the appointment a few days after being commissioned, preferring to be Chancellor of the state of Maryland), making the nomination of some other character to supply his place necessary, I determined after contemplating every character which presented itself to my view, to name Mr. Iredell, of North Carolina. . . . I had recourse to every means of information in my power and found them all concurring in his favor." In passing it may be noted that Iredell, who was to have a fine career in the court, was a native of England and his wife a sister of Dr. Samuel Johnson.

The evidence is abundant that no one has had more respect than Washington for the legal profession and that no President has been more solicitous about the importance of the judiciary and the maintenance of its integrity and strength. This is variously indicated. To illustrate, it is indicated by the appointments he made when he took up his duties as President, and it is indicated in his letter to Edmund Randolph when he invited him to become Attorney General. "Impressed," he wrote Randolph, "that the true administration of justice is the firmest pillar of good government, I have considered the first arrangement of the judicial department as essential to the happiness of our country and the stability of its political institutions. Hence the selection of the fittest characters to expound the laws and dispense justice has been an invariable subject of my most anxious concern." It can be believed that such a high conception was in no small measure derived from his own participation in the work of expounding the laws and dispensing justice and that this was a factor in the education which it was predicted he would acquire.

In Washington's time, and long before and after the county court was the most important tribunal in Virginia. While he was serving, with the exception of comparatively trifling cases, it had unlimited jurisdiction of civil cases, law and chancery, of probate matters, and of a large class of criminal cases. It had wide administrative powers touching the fiscal affairs of the county, the construction of public buildings, the laying out and construction of highways, building bridges, providing and operating ferries, the care of orphan children, the licensing of innkeepers and the fixing of their charges. Relative to the last matter the order books show that periodically the rates to be charged for liquor, the surprisingly many kinds then in use being enumerated, and for lodging and food were determined by the court. Very commonly the final item in the list is "For a night's lodging with clean sheets 6 d., otherwise nothing." The trifling nature from our point of view of some of the business of the court cannot prevent us from seeing that very much of it was of a kind to require able and discerning men on the bench and lawyers who were representative of the learning and skill of the profession.

Justices for a county were appointed by the governor, not fewer than eight and often more, there being no restriction as to the number. They remained in office indefinitely and the court recommended appointments to fill vacancies. Without the presence of four no court could be held. The clerk was an appointee of the court and in effect so was the sheriff, though he held his commission from the governor. The justices were not lawyers but nearly always the most prominent and reliable citizens of their county. They received no compensation whatever. They were thought sufficiently compensated by the honor of holding an office regarded as of outstanding importance and dignity, with the opportunity of contributing to the common good by attending to the settlement of small controversies out of court, and in court by taking part in the performance of duties which affected the property and liberty of persons and the general welfare of the public. When the Virginia Constitutional Convention of 1829-30 had under discussion the county court, then composed and having much the same jurisdiction as in Washington's day, Chief Justice Marshall, a member of the Convention, said: "It was the truth that no state in the Union had hitherto more internal quiet than Virginia. There is no part of America where less discord, less ill feeling between man and man is to be found than in this Commonwealth, and he firmly believed that that state of things was mainly to be ascribed to the practical operation of our county courts. The magistrates who composed these courts consisted in general of the best men in their respective counties. It was mainly due to their influence that so much harmony existed in the state. His emphatic opinion was that these courts must be preserved." Supporting Marshall's view, an-



Portrait by Gilbert Stuart. Photographed direct from the Original Portrait now in the Boston Museum of Fine Arts. —Courtesy Washington Bi-Centennial Commission.

other member, Philip P. Barbour, who was appointed to the supreme court by President Jackson, said he had practiced in those courts for a quarter of a century and he could say with the utmost truth that his confidence in them had grown with his growth and strengthened with his strength. At the same time Benjamin Watkins Leigh said he had heard of but two instances of corruption in the county courts in two hundred years. As to alleged incompetency and ignorance he had seen county courts which were among the ablest tribunals before which he had practiced. Speaking of the type of men who served in these courts, it will be remembered that both Jefferson and Madison were justices; that Monroe after two terms in the Presidency accepted an appointment and served as a justice in his county, and that in 1784 the victor of the Revolution was named as a justice for Fairfax County.

That the county court had a central place in the estimation of the public is easy to understand. The population was sparse and the people mainly engaged in agriculture. There were no cities and few villages large enough to be called towns. It was at the county seat when the court was in session that the inhabitants gathered. From several historians, including Fiske, we have this picture: The court day was a holiday for all the country side, particularly in the fall and spring. From all directions came in the people on horseback, in wagons and on foot. On the court house green assembled people of all classes—the hunter from the backwoods, the owner of a few acres and the great land owner. Old debts were settled and new ones made; there were auctions, transfers of property, and if election times were near stump speaking, when questions pertaining more or less to some real or fancied encroachment on popular liberty of the Crown were apt to be debated. All else aside, as one of the historians has remarked, the county court was one of the main agencies of spreading political education. In every way it was one of the agencies which furthered the education of Washington according to the prediction which had been made.

Perhaps before he had any idea of being identified with the court, Washington must have frequently witnessed such a scene as that just outlined. Such was probably the scene when in his eighteenth year he appeared in the court of Culpeper County to qualify as the surveyor of that county, and such may have been the scene when four years afterwards on March 17, 1754, he appeared early one morning in the Fairfax court and presented his commission from the Governor as Lieutenant Colonel (he was preparing to set out on the campaign to the West, the year before starting on the fatal expedition with Braddock) and took the prescribed oaths. The courts were not leisurely. In spite of the fact that the justices some times had to travel a considerable distance over wretched roads to the county seat, the Fairfax court never convened later than nine o'clock. Our ancestors seem to have been very industrious in discharging official duties and to have attached high value to the oaths under which they acted. On the occasions just mentioned Washington "took the usual oaths to his majesty's person and government, and took and subscribed the adjuration oath and test," and in Culpeper took also the oath as surveyor. The oath which was subscribed was a disclaimer of belief in the theological doctrine of transubstantiation.

Though a layman, Washington as a member of the court necessarily progressed in his knowledge of the law and of the importance of those who were trained in that profession. That he consulted statutes and law books bearing upon such matters as he was obliged to deal with is reasonably evident from the number of such works listed in the inventory of his estate. It will be plain to anyone who reads the statutes prescribing the jurisdiction and procedure of the courts that he could not have escaped becoming fairly familiar with the rules of pleadings and practice, with the distinction between law suits and chancery suits and the methods of conducting both, with attachment and injunction, with the organization and functioning of grand juries and trial juries, with the means of executing judgments and decrees, with the duties of clerks, sheriffs and other officials. He necessarily became saturated with a good deal of the knowledge and acquired to some extent the habits of mind now assumed to be confined to those who have been equipped for judicial work by long study and then by some experience at the Bar.[1] Several years ago in an address lauding the Virginia county court system, the late Holmes Conrad, who was Solicitor General under President Cleveland, not with Washington or any other particular man in view, visualized what occurred when a planter of high character and strong sense, but unlearned in the law, became identified with the court, and in reading what he says we may think of its application to Washington. The difficulties which the new judge encountered at the outset are described. He had difficulty in detecting the real questions involved and in following the testimony and argument, and he distrusted the conclusion which he reached. But "after the novelty wears away, he is able to fix his mind upon the business in hand; he detects and is able to follow the clue which leads him through conflicting testimony. He sees dimly at first, but steadily in the light of conscience he discerns the right and wrong of the case; and now he begins to apprehend and appreciate the arguments of advocates. He feels gaining on him a sense of responsibility and the importance of the work. There is slowly but gradually developing the faculties of his mind, of the powers of which he was before unconscious. He is undergoing a process of education, the effects of which become apparent to himself as also to his friends and neighbors. He is no longer led away by first impressions or whatsoever of the mere surface of matters. He learns to hold his judgment in abeyance until his mind is informed and his conscious satisfied. He goes down from his place on the bench and receives the confidence and manifest respect of the people of his locality."

Whenever it was that Washington qualified as a justice he of course took the same oaths as when

1. His Will, prepared a short time before his death, consisting of more than twenty large pages, wholly in his own handwriting, now preserved in the Record office at Fairfax and disposing of the largest estate of that kind, tends to show his reliance upon the knowledge of law which he had acquired. Towards the end he modestly says it would be evident "that no professional character has been consulted or has had any agency in drafting the will."

he qualified as a Lieutenant Colonel. In addition he took a lengthy oath as "Justice of the Peace" and another as "Justice of the County Court of Fairfax in Chancery." In the former he pledged himself among other things to "do equal right to the poor and rich after your cunning wit and power according to law; and you shall not be of counsel of any quarrel hanging before you; and the issues, fines, americaments[1] that shall happen to be made, and all forfeitures which shall be before you, you shall cause to be entered without any concealment or any imbeziling."[1] In the latter oath he was pledged to "do equal right to all manner of people, great or small, high and low, rich and poor, according to equity and good conscience and the laws and usages of his colony and dominion of Virginia, without favor, affection or partiality." The praise that can be given these "gentlemen justices" is that they lived up to their oaths.

There is no way of knowing the extent of Washington's activities as an individual justice having exclusive jurisdiction of a class of minor cases. But as he resided in the most popular section of his county and enjoyed everybody's respect and confidence, it is safe to conjecture it must have been considerable and that he always exerted his influence to quiet controversy and promote the tranquil condition for which Marshall thought the county court and those composing it were largely responsible.[2]

Far less is known than could be desired of the proceedings of the Fairfax court during Washington's service. The court papers have long since disappeared and about the only source of information are the two order books already mentioned. Looking at the one of them, which runs from April 1770, to January, 1772, containing 330 pages, it appears that Washington attended over half of the monthly terms, which was more regular than the attendance of a majority of his colleagues, Mason not excepted. In the period to which the book pertains, hundreds of civil cases were brought and in great variety—actions of debt, trespass, trespass on the case, trover and conversion, detinue, replevin and ejectment. There was constant resort to attachment. There were suits in chancery, and injunctions were issued to restrain the collection of judgments and prevent irremediable injury. The names of the plaintiffs and defendants are always given and often the names of the lawyers, not only Mr. Harrison heretofore spoken of, but others still unforgotten, among them William Grayson who was to be one of the first United States senators from Virginia, Benjamin Sebastian, ancestor of one of the first senators from Arkansas, and George Johnston who was on Washington's staff in the Revolution. He was the son of that George Johnston, like Mason a neighbor and friend of Washington, and one of the leaders of the Virginia Bar, who as a member of the House of Burgesses in 1765, according to Jefferson who listened to the debate, delivered a powerful legal argument in support of Henry's resolutions condemning the stamp tax. The resolutions were carried by a very narrow majority and would have been lost but for the votes of Johnston and Washington. The cases were tried by juries unless the defendant failed to appear or waived a trial in that manner, and verdicts and judgments were made payable in tobacco or currency and sometimes partly in each. Now and then the jurors disagreed after lengthy deliberation, and in one instance a juror was withdrawn and the case continued for "reasons exciting as well the said justices as the said parties," but the reasons for the excitement are not set out. There were now and then exceptions to the refusal of the court to set aside verdicts, and in a certain case not otherwise notable the bill of exceptions was signed by Washington and sealed with his seal. Delinquent debtors were ordered to be imprisoned and were released after twenty days confinement upon proof of insolvency. Lawyers were admitted to practice, wills were admitted to probate, letters of administration granted, guardians appointed, and the accounts of fiduciaries passed on. Poor children were directed to be bound out as apprentices and taught trades. There was much done in supervising and enforcing the collection of taxes and making expenditures for local purposes.

Relative to ferries there is this entry: "Ordered that George Mason and George Washington, Gent. be summoned to appear at the next court to give security according to law for keeping the ferries at their respective landings." Both lived on the shore of the Potomac and ferries were operated across the river to Maryland. The court was required to see to the construction, when needed, and to the upkeep of the court house and jail and warehouses for the storage of tobacco turned in for taxes. In obedience to the statute it had the duty of providing a "pillory, whipping-post, and stocks." Notwithstanding the criminal jurisdiction of the court embraced all offenses except those punishable by death, loss of limb or outlawry, the order book refers to very few serious offenses. But the court was called on to deal with a great deal of the same comparatively unimportant kind of criminal business which now crowds the dockets of the United States District courts. The order books of the time back of Washington show that many people were charged with not attending their parish churches "within two months last past"; with being "idle vagrants," and with "tending of seconds," which meant gathering a second growth of tobacco from the same stalks. The order book now referred to is full of presentments of women for having "base born children," and people for violating the liquor laws and getting drunk, for violating the Sabbath, for failing to list themselves or their property for taxation, of road overseers and other officials for neglecting their duties. There seems to have been a good deal of profanity. A man would be presented for "prophanely swearing by his God one time," or more than one time might be specified, and there was an individual presented for "prophanely swearing by his God five times within three days." Enough has been said to suggest that here was the one nisi prius court operating in a nearly limitless field conducted by picked men, who, albeit laymen, necessarily as the years went on, came to know very much of the law applicable to governmental and personal affairs, and the manner of its administration.

Fairfax County was a part of the princely domain called the Northern Neck of Virginia of which Lord Fairfax was Proprietor, embracing what are now more than twenty Virginia and West Virginia counties. He was one of the justices and on his appearance he was noted at the head of the list as the Presiding Justice. On the occasions when he and Washington happened to be on the bench together it may be imagined that he was glad to see with his own eyes how constantly there was being verified his prediction quoted at the outset that Washington "would go to school all his life and profit thereby."

1. The old spelling is retained.
2. In another way he exerted the same sort of influence. As shown by the diaries he was often chosen and acted as an arbitrator.

American Law Institute Conference of Cooperating Committees of State Bar Associations

THE conference of the American Law Institute with co-operating committees of the State Bar Associations was held at the Northwestern University Law School in Chicago on Friday and Saturday, January 22 and 23, 1932. The Institute presented to the representatives of the co-operating committees of the various State Bar Associations Restatements in Contracts and Conflict of Laws, together with a criminal statute dealing with Double Jeopardy. The Chicago Bar Association acted as host to the delegates at luncheons on Thursday, Friday and Saturday at its rooms, 160 North LaSalle Street. It was likewise host at a dinner Friday evening, at which the speakers were Gordon J. Laing, dean of the Graduate School of the University of Chicago, and the Honorable George W. Wickersham, president of the American Law Institute.

The conference was opened Friday morning by Robert W. Millar of the faculty of the Northwestern Law School, who welcomed the delegates on behalf of Leon Green, the dean of that school. The first Restatement to be considered was the chapter on Conflict of Laws dealing with the Administration of Estates. A spirited discussion arose on the floor as to whether the recent United States Supreme Court decisions beginning with *Frick v. Pennsylvania,* and the *Farmer's Loan Co. v. Minnesota,* and the latest of which is *First National Bank of Boston v. Maine,* have changed the common law rule of Conflict of Laws as to the Administration of Estates, or whether these cases are to be limited in their authority strictly to taxation questions. The majority opinion, as indicated by an "intellectual straw vote," appeared to favor the strict construction that the United States Supreme Court decisions are to be limited in their scope to taxation problems alone and are not to be interpreted as changing the general Conflicts rule as to administration problems dealing with collection of assets, payment of local creditors, and the like.

Friday afternoon the delegates considered the four final chapters of the drafts of the Institute's Restatement of the law of Contracts, which were presented by the reporter on Contracts, Samuel Williston. The Institute's reporter and his advisers have now completed their drafts of the entire Restatement of Contracts so that the second and final volume will be ready for publication after it has been submitted to the Institute's annual meeting in Washington in May.

Honorable George W. Wickersham and Dean Gordon J. Laing were the speakers at the dinner tendered to all delegates by the Chicago Bar Association on Friday evening. Dean Laing's address, "The Education of a Lawyer," was a humorous, though pointed, admonition to the profession from an informed layman. Mr. Wickersham's address was on "Lawyers and Law Reform."

Herbert F. Goodrich, the adviser on professional and public relations, gave to the Institute on Saturday morning a report as to the progress of the work in each of the forty-eight states and the District of Columbia on the local annotations to the Restatements in Contracts and Conflict of Laws to date. In many instances, a representative of the state bar committee or other state group which is in charge of the local annotation work was present and reported directly to the meeting. For those states which were unable to send delegates to the Chicago meeting, Mr. Goodrich himself reported. He also advised the delegates as to the code of Criminal Procedure which was completed by the Institute in May, 1930, many sections of which have already been adopted by legislatures in a number of states.

William E. Mikell, former dean of the Law School of the University of Pennsylvania and now its Professor of Criminal Law, presented a proposed act on Double Jeopardy. This statute proceeds upon the principle that only an acquittal or conviction—*not jeopardy of conviction or punishment*—is a bar to a second prosecution for the same offense. The statute is designed to meet the conflicting provisions both of state constitutions and decided cases, in the various states.

Among the most striking of these provisions are the following:

(1) *State may be granted a new trial.* "Where the defendant has been acquitted and in the course of the trial a material error has been made to the prejudice of the State the State shall be entitled to a new trial."

Mr. Mikell indicated that this is not now the law in any state in the Union except Connecticut. It was pointed out that this section of the Act does not violate the fifth amendment to the Constitution of the United States regarding Double Jeopardy because, when an appeal has been taken by the state and a new trial results, the defendant has not been put in jeopardy *twice* but is merely facing a continuation of the same trial or proceeding and, therefore, there is no *second* jeopardy.

(2) *Issues of law and of fact to be tried by court.* "All issues, whether of law or of fact, which arise on a motion to quash, based on a provision of this chapter, shall be tried by the court."

(3) *Discharge of jury for good cause not a bar to second prosecution.* "If on the trial on any indictment or information for an offense it is impossible to proceed with the trial or to proceed without manifest injustice to the defendant or to the State the jury may be discharged, and such discharge shall not be a bar to a subsequent prosecution of the defendant for the same offense; a discharge of the jury for any other cause is a bar to a subsequent prosecution of the defendant for the same offense."

In connection with this provision as to the discharge of the jury, Mr. Mikell pointed out that in his study of the cases and statutes he has found forty-one different reasons existing in one state or another for permitting a second trial when the jury had been discharged. The proposed Act, with the test of "manifest injustice," leaves the question to the discretion of the court.

In connection with the sessions of the Institute, the Chicago Bar Association invited three of the delegates to the Institute to give addresses at its luncheons on Thursday, Friday and Saturday. Eugene A. Gilmore, dean of the Law School at the University of Iowa and former vice-governor and acting governor general of the Philippines, spoke on Thursday on development of law in the Philippines and took as his text "Institutional Imperialism in Its Relation to Anglo-American Law in the Philippines." On Friday, Herbert F. Goodrich, Dean of the University of Pennsylvania Law School and retiring President of the Association of American Law Schools, spoke on "New Approaches to Present-Day Legal Problems." Samuel Williston, of the Harvard Law School, spoke Saturday on "Illegal Contracts."

ST. IVES, PATRON SAINT OF LAWYERS

Even Brief Perusal of His Recorded Career Makes One Realize That Here We have a Character Who May Well Represent the Ideal for a Profession—He Lived Constantly an Ideal Life of Service and Sacrifice in the Cause of Justice, amid the Same Every-Day Conditions That Surround Any Lawyer and Any Judge, at Any Time in Any Country

By John H. Wigmore

EVERY lawyer, I suppose, has heard that St. Ives is the patron saint of his profession. But it must have been in 1913 that, for me, he first came to be a real personage. We had spent a week at Pont-Aven in Brittany, the artists' favored resort on the south shore, and were starting west to St. Malo, thence to take ship for Southampton, when I happened to see, in the faithful Baedeker's "Northern France," two lines in small type, telling that at the picturesque fishing town of Tréguier the Cathedral contained the monument to "St. Yves (1252-1303), patron saint of advocates, who was born at Minihy, a village ¾ m. to the south." We determined to stop over long enough to spend a few hours there; and the visit was enough to arouse a deep interest in this wonderful man who in real life had set a standard—an unattainable one, perhaps—for our profession.

His biography has been written a dozen times in past centuries.[1] But a short sketch, from the lawyer's point of view, will suffice to make clear why the people wanted to place him in the calendar of saints.

A life of true and consistent unselfishness, full of good deeds, and devoted solely to one's immediate sphere of duty, will receive full measure of reverence from one's neighbors, and may even come to exercise a world-wide influence. Such is the moral to be drawn from the life of Ervoan Heloury Kermartin, of Tréguier in Brittany, afterwards to be hailed as Saint Ivo (or Yves), patron saint of the legal profession.

All the data of his life are known as authentically as those of any modern personage. He came from a noble family having a small patrimony near Tréguier. Carefully brought up in his youth, and destined by his mother for the sacred calling, he was sent to Paris for his university studies, in 1267, at the age of 14. At that university (which had been founded only a century earlier) among his fellow-students were the (later) celebrated scholars Duns Scotus and Roger Bacon. Here he stayed for 10 years, studying rhetoric, theology, and canon law.

Even at the University, his unselfish and ascetic habits of life were already fixed. He slept only on a pallet of straw; he wore the humblest garments; he gave away the moneys that came to him; and often he shared his meals with the poor. All through his life (as verified by copious eye-witnesses in the proceedings for canonization) such was the continual record,—living with the barest necessities of shelter and clothing, sharing money and garments and food with the needy, and giving alms freely to the miserable beggars.

From Paris he went to Orleans, to complete his studies in the Roman law; for that subject was not then taught at Paris. It was during his three final student-years at Orleans (probably) that took place the celebrated incident of the Widow of Tours,—the only one of his hundreds of cases to which tradition has attached any legal details. It runs like this:

Tours was near Orleans; the bishop held his court there; and Ivo, while visiting the court, lodged with a certain widow. One day he found his widow-landlady in tears. Her tale was that next day she must go to court to answer to the suit of a traveling merchant who had tricked her. It seemed that two of them, Doe and Roe, lodging with her, had left in her charge a casket of valuables, while they went off on their business, but with the strict injunction that she was to deliver it up again only to the two of them jointly demanding it. That day, Doe had come back, and called for the casket, saying that his partner Roe was detained elsewhere, and she in good faith in his story had delivered the casket to Doe. But then later came Roe demanding it, charging his partner with wronging him, and holding the widow responsible for delivering up the casket to Doe contrary to the terms of their directions. And if she had to pay for those valuables it would ruin her. "Have no fear," said young Ivo, "You should indeed have waited for the two men to appear together. But I will go to court tomorrow for you, and will save you from ruin." So when the case was called before the Judge, and the merchant Roe charged the widow with breach of faith, "Not so," pleaded Ivo, "My client need not yet make answer to this claim. The plaintiff has not proved his case. The terms of the bailment were that the casket should be demandable by the two merchants coming together. But here is only one of them making the demand. Where is the other? Let the plaintiff produce his partner!" The judge promptly approved this plea.

1. The ultimate authentic source in print is now a quarto volume, prepared at the time of inaugurating his new monument at Tréguier in 1890, published by Prudhomme at St. Brieuc in 1887, and edited by several Breton scholars; "Monuments originaux de l'histoire de Saint Yves;" this contains the depositions taken in 1330 at the proceedings for canonization.

There are also some monographs, based mostly on these documents, by Abbé France (1892), Prof. Paul Henry (1890?), and lawyer Ropartz (1856).

Professor Jobbé-Duval, in his large work on "Primitive Ideas in Contemporary Brittany," has collected the legends and customs about St. Ives' miraculous help to those who crave justice.

Whereupon the merchant, required to produce his fellow, turned pale, fell a-trembling, and would have retired. But the judge, suspecting something from his plight, ordered him to be arrested and questioned; the other merchant was also traced and brought in, and the casket was recovered; which, when opened, was found to contain nothing but old junk. In short. the two rascals had conspired to plant the casket with the widow, and then to coerce her to pay them the value of the alleged contents. Thus the young advocate saved the widow from ruin.

The fame of this clever defence of the widow soon went far and wide. It followed Ivo to Tréguier, whither he returned, about 1280, to practice as advocate, while still serving his initiate for the priesthood. He took only the cases of the poor, the widows, and the orphans. Every applicant for his help he required first to make oath that his cause was in conscience a just one; then Ivo would say "Pro Deo te adjuvabo," ("For the sake of God, I will help you"). And the maxim of his practice (said to be embodied in the ancient Custumal of Brittany) was that every claim must be founded on "good law and equity" ("bon droit et raison"; for "raison" or "ratio" in those days corresponded to our "equity").

Ivo was now appointed assistant judge on the staff of the archdeacon, who held court at Rennes, the capital of Brittany. About 1284 he took orders as a priest, returned to Tréguier, became curé of a suburban parish, and was made deputy-judge to the bishop of Tréguier. The bishop himself rarely sat in court, and Ivo became the sole arbiter of clerical justice for that region. It must be remembered that the church courts at that period were the most advanced in Europe, and had an extensive jurisdiction; all kinds of civil and criminal cases, and not merely ecclesiastical ones, might come to them.

Ivo's austere and humble personal life; his boundless charity; his constant endeavor to reconcile even the most obstinate litigants; and, above all, his humane sympathy for the poor and the oppressed, now made him famous throughout the country. "Advocatus pauperum" had already been the epithet applied to him. And now arose the saying which has fixed forever his place in the annals of literature, "Advocatus sed non latro, res miranda populo," "a lawyer yet not a rascal, a thing that made the people wonder."

Nor was he merely the shrewd and humane judge; he was also the learned one. His ten years of study at Paris were a token of his scholarly instincts. He now began the compilation of a record of all the customary law of Brittany. This was then a welter of all sorts of unwritten and conflicting traditions as to tenure, dues, privileges, and the like. The book which he compiled did not see the light until some 20 years after his death, when presumably it served as the foundation for the official Custumal of Brittany.

During the 19 years he served as judge, he was also curé of a parish. To his virtues as judge he added the eloquence of a preacher. Sometimes he preached as many as seven sermons in a single day, in different places; and the crowds would follow him from town to town, hanging on his message of good will and right conduct.

In 1303 his end came, and great was the mourning throughout the land. His fame had long ago reached Paris, whither he had sometimes journeyed to argue cases on appeal (and tradition had it that his is the earliest known name at the Paris bar, for this was the century in which the revival of Roman law was leading to the formation of a learned Bar).

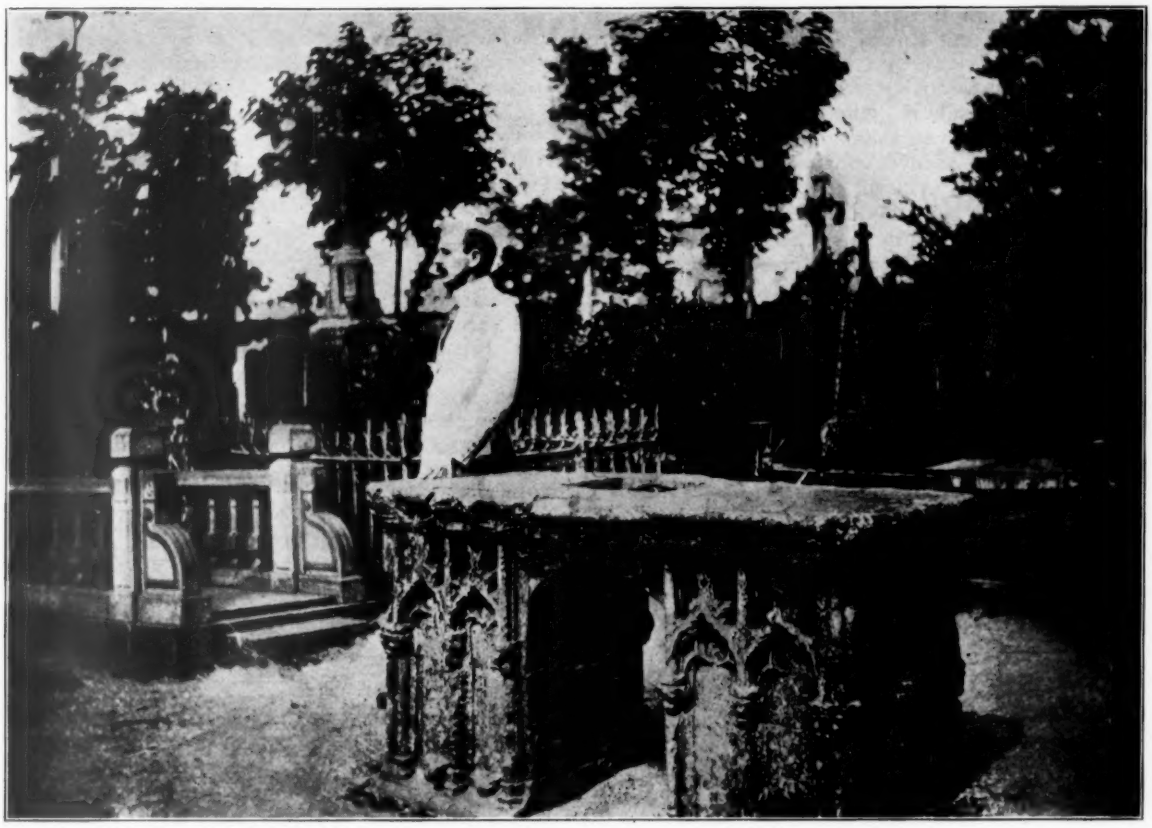
And now John, duke of Brittany, supported by Philip king of France, and his queen Anne, and many other nobles, headed a movement to declare Ivo a saint of the Church. The proposal had to suffer many delays. But at last in 1330 a commission was appointed by Pope John XXII to take the required testimony, and they came up to Brittany with a train of clerks and interpreters; for the people of Brittany used only the Breton (Celtic) language, and knew not Latin, the clerical tongue. The requirements for canonization were, in the main, two; the party must have been a person of blameless and unselfish life, and miracles must have been performed by his intervention after his death.

Some 800 witnesses were now examined by the commissioners; 500 of them at a mass meeting in the church, and the others by testimony given individually before the commissioners. The proof of his unselfish and saintly life was superabundant. Of miracles, one hundred were deposed to. Here is a typical one:

A woman of Tréguier, coming home after a day's absence, found that robbers had entered and stolen all her scanty possessions. In despair, she went to the tomb of Ivo and there prayed for his help. And as she prayed, the voice of Ivo from heaven told her the names of the robbers. There were three. They were pursued, and two of them were quickly found with their loot. But the third had escaped from the county. However, the justice of Ivo from Heaven pursued him; for as he sat safely in his shelter he was struck with blindness. The wretched fellow, realizing that retribution had fallen upon him, returned to Tréguier and repentantly restored to the woman all that he had taken. Whereupon a second miracle ensued; for the repentant thief immediately received back his sight. And this miracle was indeed well verified; for it was the thief himself who testified to it; he was No. 131 of the witnesses.

As a proceeding for canonization is in church practice a judicial inquiry, it will be interesting to our profession to see how carefully the witnesses were examined in proof of the necessary facts. Let us take the testimony of a professor of law, one Peter of Lemur. This professor of law, aged 60, (Witness No. 27) after testifying to the austere and unselfish life of Ivo, as personally observed ("I have seen him at table in my mother's house, and he never partook of fish or flesh or wine, and he always wore poor garments, though he had a good income both from his own estate and from his church office"), went on to testify to a notable miracle performed on the professor's own daughter, and was then strictly cross-examined about it:

"Being sworn and examined as to miracles of the said master Ivo Heloury, he said on his oath that a daughter of his who had a blind spot in her eye was cured the next day after they had vowed her to Saint Ivo. Asked when that was, said it was 23 years ago or thereabouts. Asked what month, said it was the month of May or June, but he does not remember what day. Asked who was there, said that he the witness was, and Leveneza his wife, and Mahaute the daughter's nurse, and several other persons whom he does not remember. Asked



An American Lawyer at the Tomb of St. Ives, Tréguier, Brittany

what place it was, said that it was in his town of Quasquer, Guitmace parish, diocese of Tréguier. Asked who was invoked, said that Saint Ivo was invoked. Asked what words were used, said that the aforesaid wife said to the witness, 'Let us vow her to Saint Ivo, because I would rather that she were dead than that she should live this way'; and then they vowed her, saying 'Saint Ivo, if thou restorest her to health, we will go barefoot to thy tomb.' Asked the name of his daughter, he says she was called Margilia. Asked how that infirmity came upon her, he said that she had three times suffered a fever and then had the illness call "variole,' and then came the blind spot in her eye. Asked how long she had had the said eye-trouble before they made the vow, he said about eight days. Asked how large a spot was it, he answers almost as large as a bean. Asked what time elapsed between the vow and the cure, answers that they made the vow on a certain day after dinner, and the next day in the morning the mother and the witness found the girl cured. Asked if the girl is alive, answers she is not; asked when she died, says he does not remember the date. Asked how long it was after she was cured, said about two years. Asked if the cure was perfect and if that eye was as good as the other, answers yes, nor could it be seen that she ever had had a defect. Asked who saw her after the cure, answers that he, the witness, and the mother and the nurse and the late prior of Lamur, now dead, saw her, and several other persons now dead, and also some persons whose names he does not now recall."

This was a pretty thorough cross-examination, and the law professor was a convincing witness.

One other among the witnesses was a lawyer (No. 1 on the list), and his testimony is worth a brief quotation. He was 90 years old, and had known Ivo since the latter's boyhood, having taught him his first letters, then his grammar, and finally his civil law. This venerable man's testimony to his pupil's saintly and austere life was direct and detailed; and then he went on to speak of Ivo as advocate and judge:

"Ivo without charge took cases for the poor, the widows, the orphans, and other distressed persons, offered himself for the defense of their rights without being asked, and thus was commonly known as 'the advocate of the poor and oppressed.' Asked how he knew this, said that he himself had often been present as advocate with the said master Ivo at many trials. Asked how he knew that Ivo had acted without charge, said that many poor persons had told him of it, with warmest gratitude for Ivo. Furthermore, this witness testified that the said master Ivo was a man of great justice as a judge. Asked how he knows this, said that he had seen Ivo as judge both at Rennes and at Tréguier, where Ivo gave speedy justice to every one without distinction of persons. Said also that one-third of the salary which Ivo received as chancellor at Tréguier was given in alms to the poor, and that he would always use every effort to reconcile in peace and concord the parties that came before him with their disputes. Asked how he knows this, said that he had many times seen and heard it, when he was advocate in the court of Ivo at Théguier."

And so there was ample proof, from a cloud of eye-witnesses, of this long life of sacrificial service in the cause of justice.

No wonder that the movement for declaring him a saint received universal support. And finally, on May 19, 1347, Pope Clement VI at a solemn consistory ordered his name placed in the calendar of saints. That date has ever since been his saint's day, on which homage is paid to his name.

In the next century, and later, his fame spread over Europe. Several faculties of law placed themselves under his protection; supreme courts, bars, and senates, invoked his blessing; and not in

France alone; for the list includes Ghent, Brussels, Louvain, Antwerp, Rome, and other cities, where many memorials can still be seen.

His original tomb is in the churchyard of Minihy, a little suburb, whose church he endowed in his will; and even today the country-people of Brittany may be seen devoutly making pilgrimage to this tomb and invoking his help. At Tréguier, in the Cathedral, is a magnificent monument erected in his honor in 1890, to take the place of the one destroyed a hundred years before at the burning of the church by the revolutionists. But the most fitting place of homage to the memory of this good man of unselfish life, lawyer and judge, is still the simple tomb in the churchyard of Minihy. And the fellow members of our bar who, after attending the Congress of Comparative Law at the Hague next August, choose to turn aside for a visit to this sequested spot in old-time Brittany, may well feel that they are performing a pilgrimage to the honored saint of their profession.

Even a brief perusal of his recorded career makes one realize that here we have a character who may well represent the ideal for a profession. He was made a calendar-saint, not (like so many) because he was a martyr at the stake, nor merely because he was a faithful servant of the Church, but because from his adult youth for thirty-five years he lived consistently an ideal life of service and sacrifice in the cause of Justice. In short, he was declared a saint in heaven because he had lived a saintly life on earth.

And he had pursued this career as an ordinary man, amidst the very same every-day conditions that surround any lawyer and any judge at any time in any country. Well may he be enshrined in our aspirations as an ensample of the ideal of Justice attainable in real life by a member of our profession!

Uniform Classification for Judicial Criminal Statistics

"IF the existing forms of reports were to be accepted at their face value, there are 312 crimes worth recording in Michigan, 18 in Maine, and none in California," says a statement issued in behalf of the Institute of Law of Johns Hopkins University. "South Carolina considers it worth while to list eight offenses, and twenty-five States make no official admission that any crime occurs within their borders. These conditions explain why the report of the Wickersham Commission on criminal judicial statistics in the United States is summed up in the statement that such statistics are practically nonexistent.

"The facts cited above are brought out in a report just made to the Institute of Law of the Johns Hopkins University by two Ohio research workers, Willis Livingstone Hotchkiss, of the Western Reserve University Law School, and Dr. Charles Elmer Gehlke, professor of sociology in the same institution. Their findings are embodied in a book entitled 'Uniform Classifications for Judicial Criminal Statistics,' just published by the Institute of Law, which is conducting a survey of the judicial systems of several States, including Ohio, New York and Maryland.

"The object of the survey was to obtain, if possible, some form of approach to the problem of the geography of crimes in the United States. That there is no such approach at present is indicated in the first paragraph of Hotchkiss and Gehlke's work, in which they declare, 'such judicial statistics as are published in the United States are characterized, with rare exceptions, by their individuality, gross inadequacy, and general uselessness for any practical purpose.' The first question of course that faced the workers as they began their inquiry was, what is a crime? On this fundamental they found an astonishing diversity of opinion. The same act may be classified under a dozen different headings in as many States; and, as a matter of fact, only 23 States make any effort to keep State-wide judicial statistics of any sort.

"Similarly, the local variations of procedure make it extremely difficult to collect comparable data for the entire country. For instance, when the grand jury refuses to return an indictment there are in actual use in the United States eight different ways of reporting the fact; and in a single State, Maryland, three of the eight are actually used today. There are now in use no less than 92 ways of reporting the elimination of a case from the record by some process other than conviction. In the midst of such confusion it is patently impossible to obtain clear, definite data on the prevalence of crime in one community relative to its prevalence in another community across a State line.

"An endeavor to work out uniform classifications for such statistics was the object of the study the results of which are presented in the volume above mentioned. After consideration of all the systems now in use the authors have devised one of their own, not exactly like any of the others, but constructed with an eye to simplicity and to adaptability to any form of procedure. Simultaneously with its publication, the Institute of Law has published a bulletin illustrating the application of the Hotchkiss-Gehlke method to the criminal judicial statistics of a State, the one selected being Maryland, where a study of the judicial system is now under way. Dr. L. C. Marshall, of the faculty of the Institute, announces that by using this method the entire State of Maryland was tabulated in 72 working hours. It is possible now to see at a glance the incidence of any given crime in any given jurisdiction in Maryland, and to trace its progress through the courts to final disposition, for the year covered, 1930."

Signed Articles

As one object of the AMERICAN BAR ASSOCIATION JOURNAL is to afford a forum for the free expression of members of the bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of this JOURNAL assume no responsibility for the opinions in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

COORDINATION OF THE BAR

Committee for Consideration of This Subject Issues Statement to Acquaint Members With Developments to Date—Proposed Amendments to Constitution and By-Laws—Members Urged to Give Careful Attention to Advantages and Disadvantages of Suggestions Made and Communicate Their Impressions to Its Secretary—Stimulation of Interest and Discussion of Whole Problem Highly Desirable

THE Committee on Coordination of the Bar, which is acting under the authority of the Executive Committee, has made several reports to the Executive Committee. The last report was referred by the Executive Committee to the General Council for its consideration, study and report, including such further recommendations as it should care to make.

Among other things in its report, the Committee on Coordination of the Bar stated:

"Your Committee feels that the subject under consideration is difficult to solve, and that it should be borne in mind that it will probably take four or five years to reach a solution which may endure for some time to come; and that the suggestions which they are now making should be considered as a first step, and a means of ascertaining by awakening the interest of the members of the Bar, and by experience, what further procedure should be taken in the future.

"Your Committee is of the opinion that it is the sentiment of the members of the Bar Association that the present form of this organization is not well adapted to such a large membership as is presently in the Association, and that some changes should be made in order to make it more effective.

"The end must be reached slowly, partly because of the existing lack of machinery in the states which can furnish support to any proposed changes, and partly because of the necessity of preserving the income of the national association until conditions justify a changed procedure.

"We realize that no plan will be effective unless the lawyers of the country cooperate with and use that plan, and the greatest difficulty will be, not in evolving some such plan, but in arousing the interest of the lawyers of the country to cooperate with any plan suggested, in a manner that will make that plan effective, and we believe that the members of the General Council can be organized as one of the most effective instruments for arousing this interest in the members of the Bar in their respective states.

"Your Committee feels that members of the General Council of this Association probably know the sentiment of the lawyers of the different states more accurately than any other body of this Association, and that they are the most representative body, and your Committee is of the opinion that if the members of the General Council were given more recognition and were given more work to perform in the Association, the States could be induced to nominate the members of the General Council in some manner in which the members of the Bar of that State would more generally participate, and that such members of the General Council would thus feel the responsibility of their position, and would give this Association much benefit by virtue of their intimate knowledge of the attitude and feeling of the members of the Bar of their respective states toward the American Bar Association, and that they could, by their active assistance, enable this Association to form a clearer idea of what was best to be done in order to bring the Association and its work in closer contact with the lawyers of this country."

And the Committee recommended:

I.

That the By-laws be amended to provide for the nomination of the members of the General Council by each state, in advance of the annual meeting of the American Bar Association, by such procedure as was, from time to time, adopted by a majority of the members of the American Bar Association, living in each state. Such procedure to be assented to by a majority of the members of the American Bar Association in such state, with or without formal meeting, and to be filed with the Secretary of this Association, to be effective until superseded by later action of the same sort, and to provide in all cases for the nomination of a member and an alternate member. If neither the nominee nor the alternate were ready to serve at the opening of the annual meeting, members present from that state could select a new nominee.

Whenever the members of any state shall have failed to adopt another method of nominating members of the General Council, or, having adopted one, shall have failed to make the same effective, that then the present method of nominating members of the General Council established by usage shall obtain.

II.

The By-laws should be amended to provide that the General Council should hold more frequent meetings,—the usual meeting during the progress of the annual meeting of the American Bar Association, and one or two meetings immediately preceding the annual meeting, and at least one meeting during the year between the meetings of the American Bar Association.

III.

That the Constitution should be amended to provide that the members of the General Council should be elected for a period of three years, instead of one year, and should provide that one-third of the General Council should be elected each year. This would require, in the beginning, that some method should be adopted whereby one-third of the members would retire at the end of the first year, and an additional one-third at the end of the second year.

And the General Council recommended, in addition thereto, that the By-laws of the Association be changed so that the members of the General Council

shall hereafter take and assume duties of office at the conclusion of meetings at which they are elected, and not before.

IV.

That the Executive Committee, under the provisions of the existing Constitution, refer to the General Council for its consideration, questions affecting the interest, opinions and general welfare of the American Bar Association. And the General Council should be requested by the Executive Committee to give consideration to the subject of ascertaining from the State Bar Associations, State Bar executives and bar leaders in the several states, their attitude toward some form of affiliation between the state and American Bar Association, so that the American Bar Association may become the means of more accurately expressing the sentiment of the lawyers of the country; and that the General Council be requested, after due consideration, to make to the Executive Committee, from time to time, such suggestions on the subjects referred to them, as they may deem pertinent and advisable.

V.

That ultimately it may be desirable to give to the General Council certain legislative powers, in order to popularize the Association, and in order to aid its legislative function, and if it should be determined that this Association should possess a house of delegates, similar to that in operation in the American Medical Association, that the General Council could be developed to become the legislative body in which each state would have one or two representatives.

VI.

That the Executive Committee consider the advisability of employing such number as it may from time to time deem advisable of representatives to visit the various Bar Associations of the United States and otherwise inform the profession of the purposes and achievements of the American Bar Association.

VII.

That arrangements should be made for calling a meeting of the Vice-Presidents and Local Council for each state, immediately after their election, at which meeting perhaps an address should be made by the President, and the Vice-Presidents and Local Councils should be made acquainted with their duties and should be urged to be more active in the Association.

In considering the report, the General Council approved in substance most of the suggestions made by the Committee, and made the following additional recommendations to the Executive Committee:

That the Executive Committee consider the advisability of fixing the dues at One Dollar ($1.00) per annum of members during the first five years after their admission to the Bar, provided, however, that that can be done in the opinion of the Executive Committee without serious financial loss to the Association.

That the members of the General Council and the members of the Local Council in each state shall constitute a committee for their state, of which the member of the General Council shall be chairman, to further the interests and opinions of the American Bar Association in such manner and in such ways as may be suggested by the General Council with the approval of the Executive Committee.

That the Executive Committee from time to time refer to the Vice-Presidents and Local Councils of the States for consideration, advice and recommendation such questions concerning the general welfare of the Association as it may deem proper.

That the subject matter of the report and this report thereon be referred to the Committee on Coordination of the Bar with instructions to proceed with respect thereto and report thereon at such time as to the Executive Committee may seem for the best interests of the Association.

After the suggestions of the General Council were received, and upon further consideration, your Committee reported to the Executive Committee, suggesting the proper amendments to the Constitution and By-laws of the Association to carry into effect the above mentioned suggestions, with some modifications:

First: It was deemed advisable that there should be ten Vice-Presidents, one from each United States judicial circuit, instead of having one vice-president from each state, as now provided.

Second: It was also deemed advisable that a member of the General Council might be elected for a term of one, two or three years, as each state should determine; it was found that some of the states did not desire to elect its member of the General Council for more than one year, while others did.

Third: It was deemed advisable that one member of the General Council should be elected to represent all the members of the Association who were not residents of any state of the United States or of the District of Columbia.

Fourth: It was also deemed advisable to provide that the expenses of members of the General Council who attend any meeting held, other than regular meetings, might be paid by the Association out of such appropriation as the Executive Committee should make.

Fifth: That the name of the Local Council should be changed to State Council, as this more truly represents their function.

These proposed amendments to the Constitution and to the By-laws will be embodied in appropriate amendments to the Constitution and By-laws, and submitted to the Executive Committee for their approval, and if approved will then be printed and published, to be voted upon at the next annual meeting.

Your Committee appreciates that a comprehensive plan, definite in theory, and embracing concrete recommendations, is desirable. It will endeavor to develop such a plan as soon as it can ascertain the considered opinion of the membership of this Association, and its leaders, as well as that of the Bar of the country at large, without whose endorsement and cooperation no plan can succeed. To this end, your Committee requests the members of this Association to give careful attention to the advantages and disadvantages of the suggestions herein made, and (1) to communicate to the Secretary of the Committee their impressions, and (2) to stimulate interest in and discussion of the whole problem by those members of the bar in their respective communities who, by their willingness to contribute effort for the good of their profession, have shown that they have its best interests at heart.

Respectfully submitted,

COMMITTEE ON COORDINATION OF THE BAR: PROVINCE M. POGUE, JAMES H. CORBITT, JOHN A. ELDEN, JEFFERSON P. CHANDLER, Chairman; PHILIP J. WICKSER, Secretary, Buffalo Insurance Bldg., Buffalo, New York.

THE COST OF CRIME AND CRIMINAL JUSTICE

Report Showing Expenditure by Federal, State and City Governments for Criminal Justice in Excess of $350,000,000 Per Year Declares "It Is of the Utmost Importance That Expenditures for the Administration of Criminal Justice Should Be Kept Wise; It Is Much Less Important That They Should Be Kept Small; and It May Well Be That Wise Expenditure Will Involve an Increased Direct Cost"

By Ruth Reticker

Research Assistant, The Institute of Law, The Johns Hopkins University

A NECESSARY though not necessarily obvious part of the study of law observance and enforcement is publication Number 12 of the National Commission on Law Observance and Enforcement, *Report on the Cost of Crime*.[1] As the Commission reports, "the financial effects of crime as reflected in the cost of crime and criminal justice are matters of general interest and definite significance as indicating the importance to the community, from a monetary standpoint, of the adequate control of crime, and as bearing upon questions of efficiency and economy in the administration and enforcement of the criminal law."

The cost of enforcement might have been made a definite part of such separate Wickersham reports as *Enforcement of the Prohibition Laws; Prosecution; Federal Courts;* and *Penal Institutions, Probation, and Parole*. There is great gain, however, in assembling all this material on the cost of crime in this separate report, since no comprehensive, scientific study of the cost of crime and criminal justice in the United States had previously been made.

This present volume contains a brief summary statement on the cost of crime signed by the Wickersham commission and a report on the cost of crime and criminal justice prepared under the direction of Goldthwaite H. Dorr, Esquire, and Sidney P. Simpson, Esquire, of the New York Bar. It is a well integrated volume, embodying the work of many experts in the fields of accounting, economics, penology and statistics, and reflecting the assistance of a larger advisory group of experts in municipal government, administration, and finance. Appendix B requires 26 pages to report the list of "persons and organizations responsible for field investigations of the municipal costs of criminal justice." The entire volume runs 453 pages of text and 200 pages of appendices. Findings are presented in 111 tables scattered through the report.

The discussion is divided into ten parts dealing with (1) Introductory Analysis of the Cost of Crime; (2) The Cost of Administration of Criminal Justice by the Federal Government; (3) Published Statistical Material on State and Municipal Costs of Administration of Criminal Justice; (4) The Cost of State Police Forces; (5) The Cost of State Penal and Correctional Institutions and Parole Agencies; (6) The Cost of Administration of Criminal Justice in American Cities; (7) Private Expenditures for Protection against Crime; (8) Private Losses Due to Criminal Acts; (9) Indirect Losses to the Community Due to the Existence of Crime; and (10) Summary and Recommendations.

Each part is developed completely and cross referenced to the other parts; there are more than a thousand footnotes in addition to the footnotes to the tables. This gives an impression of repetition if one reads the text straight through but should make the report useful to the research worker.

The report starts with a theoretical analysis of the cost of crime. Its thesis is that the cost of crime to the country could be arrived at by determining (*a*) the actual annual national income; and (*b*) what the annual national income would be if there were no crime. Then the difference between *b* and *a* would be the annual economic cost of crime to the country, the *ultimate* cost of crime. Since the second factor (*b*) is wholly unascertainable, the report narrows down mainly to a discussion of the *immediate* cost of crime, that is, the aggregate dollars and cents burden on the individual members of the community represented by expenditures for preventing and punishing crime and by losses due to criminal acts.

The cost to the Federal Government of administering the criminal law in 1929-30 is computed, in Part 2, as $52,786,203, or $0.430 per capita, 1.37 per cent of the entire expenditures by the Federal Government. This million dollar per week expenditure is 68.1 per cent for federal police (criminal activities only, allocated); 3.7 per cent for prosecution; 12.0 per cent for courts (the district courts being responsible for 10.6 per cent and the criminal business of the Supreme Court for only 0.1 per cent); 16.1 per cent for penal institution treatment and less than 0.1 per cent for probation and pardon. Thirty-nine preliminary tables which assemble these costs and make allocations to criminal activities are available for anyone interested in the detailed figures or in the method followed.

The total figure for the cost of federal criminal justice is analyzed to show the cost of enforcing various types of laws. The most important are motor vehicle theft, 3.9 per cent; violations of anti-narcotic laws, 6.9 per cent; and violation of prohibition laws, 66.0 per cent.

The difficulties in computing the cost of federal criminal justice might well be surprising to anyone who has not worked with the published figures. With only one governmental unit concerned, the problem seems simple. But adequate and regularly published figures as to the expenditures of the Federal Government for

1. National Commission on Law Observance and Enforcement, Number 12, *Report on the Cost of Crime*, Government Printing Office, 1931, pp. 657.

the administration of criminal justice do not exist. To assemble the figures for the cost of federal criminal police agencies alone, it was necessary to allocate expenditures of fifteen agencies outside the Department of Justice, distributed among six of the executive departments and one independent commission.

Part 3 is a criticism of published statistical material on state and municipal costs of administration of criminal justice, a criticism which is echoed by everyone who has tried to use existing statistics. The conclusion is that "no satisfactory study of the cost of administration of criminal justice in the United States as a whole or in any state or municipal subdivision can be made solely on the basis of existing published statistics." As a matter of fact, that criticism is largely if not wholly true of the entire field of costs of the administration of justice, civil and criminal.

The discussion of "problems which arise in determining state and municipal costs of administering criminal justice" and "requisites of satisfactory cost statistics" should certainly be read by every investigator starting a report in this field and by every public officer providing for fiscal reporting.

Appendix A contains a 27-page bibliography to Part 3. This includes books, articles, and other secondary material on the cost of crime, and government reports containing statistical data on the cost of administration of criminal justice. Obviously great care was taken to make these lists complete and up-to-date through letters to state and municipal officers and through examination of relevant materials in the Library of Congress, the New York Public Library, and the special collection assembled at the Harvard Law Library by Professor Sam B. Warner for his study of criminal statistics other than financial. The resultant bibliography will be of great service to all students of the subject, despite some errors of omission. It happens that Ohio, the state with which this reviewer is most familiar, is inadequately represented. It is unfortunate that the latest copy of *Comparative Statistics, Counties of Ohio* examined was for 1927[2] and that *Comparative Statistics, Cities of Ohio* was missed altogether. A start has been made on uniform accounting in this state and these reports of the Bureau of Inspection and Supervision of Public Offices, a division of the office of the Auditor of State, present much useful comparable information for counties and cities. The county report for 1929, issued in 1930, makes no separation of court costs as between criminal and civil cases, but its tables on county expenditures for sheriffs and for corrections would have been a satisfaction to the writers who had to report that "figures as to expenditures for sheriffs are practically non-existent."

In Part 4, state police costs are assembled for eleven states only, but these eleven include "all state police forces whether denominated as highway police, rangers, or otherwise, which regularly exercise important police duties relating to violations of the criminal law generally," particularly in rural areas. The total of $5,477,571 thus expended for state police is not all chargeable to the administration of criminal justice. Allocations of from 10 per cent (Maryland) to 100 per cent (Texas) are made to segregate the cost of their general law enforcement duties, a total of $2,661,389. No allocation is made for Maine or Michigan because no estimate was obtained.

Other state agencies having police duties, such as the division of criminal identification, are not included. This is certainly not a large item, however. Not all states maintain such an organization and the expense of existing bureaus is not large. Ohio, for example, has spent an average of $10,500 annually during the past three years for its Bureau of Criminal Identification.

Much more significant figures are presented, in Part 5, for state, penal, and correctional institutions for adults (total $36,455,539 in 1928); institutions for minors (total $14,556,239) and state parole agencies ($709,344); a grand total of $51,721,122. These expenditures constitute 4.28 per cent of the total of $1,208,286,155 spent by the states for all general government purposes in 1928 or $0.423 per capita.

Detailed figures are given for 95 institutions for adults and 51 institutions for minors. The expenditures per inmate by institution, by state, and by geographical district might well form the starting point for inquiries into the efficiency of different institutions. The table below, listing the highest state, lowest state, and average state expenditures together with average federal expenditures for each type of institutions suggests what wide variations there are. As the report properly emphasizes, such figures in themselves do not afford a basis for judging the comparative economy and efficiency of the institutions. "A low cost per inmate may mean an efficient and economical institution or a parsimoniously run, inefficient institution which makes rather than rehabilitates criminals. Moreover, operating costs per inmate are very largely affected by such elements as climatic conditions, the type of housing, the degree of security regarded as desirable, and other factors, which are wholly independent of the efficiency of prison administration."

ANNUAL COST PER INMATE IN PENAL AND CORRECTIONAL INSTITUTIONS, 1928[3]

Type of Institution	*States Reporting*	*Lowest State Expenditure*		*Highest State Expenditure*		*Average State Expenditure*	*Average Federal Expenditure*
Penitentiary for Men	47	Virginia	$ 77	Maine	$1,015	$312	$345
Reformatories for Men	20	Kentucky	203	Connecticut	768	321	444
Institutions for Women	17	Ohio	334	New Jersey	738	544	739
Institutions for Boys	*	W. Virginia	243	Maryland	649	416	308
Institutions for Girls	*	W. Virginia	312	Oregon	837	483	616
Institutions for Both Sexes	*	Mississippi	318	Michigan	650	485	...
Average Juvenile Institutions	48		...		...	441	367

This section on penal institutions includes a discussion of the problems of source material. Forty-eight states and a larger number of institutions mean a great variety of reporting practices, but it was not necessary to resort to the local records. The work-sheets of the Bureau of the Census in compiling *Financial Statistics of States, 1928* and *Prisoners in State and Federal Prisons and Reformatories, 1928,* were

2. The 1927 county report was conceived as a report to taxpayers of the net cost of various county departments and so receipts were subtracted from expenditures, thus giving expenditure figures which were meaningless for the purposes of the Commission.

3. Compiled by the reviewer from tables, pp. 222, 225, 234, 235.
*Not clear from tables presented.

made available for this study. A comparison of the two sets of figures for institutions for adults, institution by institution, shows wide divergences in the expense items for various institutions and in the totals, $27,481,754 on the institutional basis and $40,568,202 on the state basis. Most of the differences arise in handling purchases for prison industries, in accounting for transportation of prisoners, and in methods of accounting for capital outlays. All students who use criminal financial statistics will agree that "it is unfortunate that the Bureau of the Census should issue two irreconcilable sets of financial statistics as to State penal institutions for adults, and it is to be hoped that this condition will be corrected by the bureau."

The cooperative research involved in the section on Municipal Costs of Criminal Justice wins the respect of anyone who has ever tried to assemble such costs for one such community. It was imperative that such costs be included in this report, since the largest portion of the total cost of criminal justice to the country is paid out locally through city and county governments. Even when the decision was made to limit the study to cities over 25,000 in population it was realized that it would require twenty years of work for one investigator to complete the study, or would cost $70,000 (more than three times the amount available for the entire cost of crime investigation) to set up the twelve or fifteen regional investigations which could have gathered the material during the life of the Commission. The great variations of practice from state to state and city to city, the division of responsibility for criminal justice between city and county, and the lag of methods of public accounting behind modern business methods had to be taken into consideration in outlining the study.

Appendices B to F show the thoroughness of the organization and the constructive imagination in planning the assembly of municipal costs through volunteer services on the part of educational institutions, research bureaus, municipal leagues, chambers of commerce and city administrations, and in supervising and coordinating the work of these scattered investigators. The reprints of the Manual for Studies of the Cost of Administration of Criminal Justice in American Cities; the sample Report on the Cost of Administration of Criminal Justice in Rochester, N. Y.; the Outline of Project for Studies of the Cost of Administration of Criminal Justice; and Instruction Circulars Issued to Field Investigators fully describe the methods followed.

Part 6 compiles and interprets the results of 300 separate studies which were secured from 115 different independent agencies. All cities over 250,000 in population, over 90 per cent of the cities over 50,000, and over 80 per cent as regards number and 90 per cent as regards population of the cities over 25,000 are included in the report. The total expenditures of these 300 American cities for the administration of justice in 1930 (including an allocation, in many cases, of county costs for prosecution, courts, and penal and correctional institutions) amounted to $243,551,915 or a per capita expenditure of $5.47. Of this total municipal cost, 78.3 per cent is the cost of the police; 8.3 per cent is for penal and correctional institutions; 8.1 per cent, criminal courts; 3.5 per cent, prosecution; and 1.8 per cent, probation.

As was to be expected, the figures for the various cities show great divergence in the total per capita expenditure and in the expenditure for each of the items: police, prosecution, public defense (thirty-five cities only), criminal courts, criminal work of appellate courts (twenty-eight cities only), penal and correctional institutions, and probation. Even among the twenty-five largest cities of the country great differences are evident, as will be seen in the table below:

PER CAPITA COST OF CRIMINAL JUSTICE IN 25 LARGEST AMERICAN CITIES, 1930[4]

		Population 1930	Total Expenditures	Police	Prosecution	Public Defense	Courts	Penal Institutions	Probation
1.	New York	6,930,446	$7.76	$6.23	$0.25	....	$0.65	$0.49	$0.14
2.	Chicago	3,376,438	6.65	5.70	.17	$0.002	.36	.36	.06
3.	Philadelphia	1,950,961	8.75	7.29	.17	....	.59	.59	.11
4.	Detroit	1,568,662	7.29	5.97	.13	....	.53	.48	.18
5.	Los Angeles	1,238,048	6.18	4.51	.41	.026	.36	.74	.16
6.	Cleveland	900,429	4.90	3.76	.14	.031	.32	.52	.13
7.	St. Louis	821,960	6.95	5.86	.12	....	.36	.53	.08
8.	Baltimore	804,874	5.59	5.09	.07	....	.22	.21	.01
9.	Boston	781,188	9.64	6.53	.12	....	1.66	1.02	.31
10.	Pittsburgh	669,817	6.43	4.26	.45	....	1.36	.16	.19
11.	San Francisco	634,394	6.25	5.14	.18	.043	.19	.57	.17
12.	Milwaukee	578,249	4.86	3.99	.12	....	.26	.37	.12
13.	Buffalo	573,076	5.84	4.66	.13	....	.35	.54	.16
14.	Washintgon	486,869	9.21	7.19	.18	....	.83	.98	.02
15.	Minneapolis	464,356	3.58	2.65	.21	....	.17	.42	.13
16.	New Orleans	458,762	3.91	2.58	.17	....	.54	.62	..
17.	Cincinnati	451,160	4.45	3.43	.15	....	.36	.47	.05
18.	Newark	442,337	7.71	5.76	.25	....	.73	.79	.18
19.	Kansas City	399,746	4.21	3.07	.22	....	.23	.55	.14
20.	Seattle	365,583	4.47	3.72	.15	....	.26	.24	.10
21.	Indianapolis	364,161	4.05	3.22	.14	.001	.22	.44	.07
22.	Rochester	328,132	4.32	3.40	.18	....	.24	.37	.13
23.	Jersey City	316,715	11.30	9.52	.31	....	.52	.69	.26
24.	Louisville	307,745	3.51	2.68	.10	....	.15	.50	.08
25.	Portland	301,815	4.16	3.38	.14	....	.19	.45	..

If instead of the twenty-five largest cities a list had been made of the twenty-five cities showing the highest per capita expenditure, the list would have omitted thirteen of the cities in the table above and would have included the following thirteen smaller cities:

	Population 1930	*Per Capita Expenditure*
Hoboken, N. J.	59,261	$8.32
Dearborn, Mich.	50,358	7.89
Bayonne, N. J.	88,979	7.13
Chelsea, Mass.	45,816	6.96
Yonkers, N. Y.	134,646	6.70
Atlanta, Ga.	270,366	6.56
Mount Vernon, N. Y.	61,499	6.48
Kearney, N. J.	40,716	6.35
Newton, Mass.	65,276	6.28
Trenton, N. J.	123,356	6.26
West New York, N. J.	37,107	6.26
New Rochelle, N. Y.	54,000	6.08
Savannah, Ga.	85,024	5.97

Obviously one factor in the high per capita cost of

4. Compiled by the reviewer from tables pp. 283 to 333; 644 to 655. It has been observed that the total per capita cost (from Table 13) does not in 7 cases equal the sum of the constituent per capita costs (from Tables 6 to 12). The figures are reprinted as listed excepting Jersey City, where the per capita police costs were refigured, since $7.45 given was obviously an error.

most of these cities is their proximity to big cities (Detroit, Boston, New York), not their own size.

It is emphasized that the report on municipal costs of criminal justice is but a progress report. The complete study contemplates an analysis, by modern machine statistical methods, of the cost of criminal justice in representative American cities in the light of community conditions; the ascertainment of the factors on which that cost depends; and the determination, if possible, of optimum expenditures for criminal justice in cities of various types. The ultimate purpose of such a study is the development of municipal standards of expenditures in the field of criminal justice which may be used to measure the efficiency of criminal law enforcement in urban communities. A plan for completing the investigation is outlined, and a plea made that the study be finished, either under the auspices of the Federal Government or sponsored by some responsible private organization in the government research field.

Meanwhile existing records may be improved. The investigation indicated that the methods of keeping public financial accounts in most counties and in many of the smaller cities of the country are in serious need of improvement,[5] and the report outlines methods to correct that situation.

In Parts 7 and 8, Private Expenditures for Protection Against Crime, and Private Losses Due to Criminal Acts, no attempt is made to assemble figures for the total cost bill. The effort is rather to present a general descriptive account of the character and importance of expenditures made by private individuals and organizations for the prevention and detection of crime and for the correctional treatment of criminals, with some illustrative figures which show "the order of magnitude" of the expenditures. Similarly the extent of losses due to crimes against property is suggested by a listing of insured losses in various fields (a total of more than $47,000,000 a year) and of premiums for insurance against crime (an average of more than $106,000,000 during the last four years), which may be considered a cost of the possibility of crime. Attention is called to private losses incident to the administration of criminal justice, represented by such immeasurable items as loss of earnings due to service as jurors in criminal cases and attendance in court as witnesses.

A plea is made for further detailed studies of commercialized fraud and racketeering. These modern developments of organized crime as a business are labelled "by far the most serious problem with which criminal justice in present-day America must deal." The summary states, "It is easier to identify the $5.70 per year chargeable to each inhabitant of Chicago on account of municipal police expenditures than it is to ascertain each such person's share of the amount annually extorted from the public of Chicago by racketeers; but the latter cost is in fact probably more than the former."

Of particular interest to attorneys are the recommendations concerning procedure. Arguing from its position that "if jury service imposes unreasonable burdens on the citizen, the administration of justice is bound to suffer," the report recommends that requirements of presentment by grand jury be modified as to many classes of offenses; that waivers of jury trials in criminal cases be permitted and encouraged; that loss of time of jurors and witnesses be minimized by a more efficient organization of docket procedure in the criminal courts; and that a study be made of the desirability of more adequate compensation to jurors and of reimbursement to witnesses.

Though the immediate cost of crime, as outlined in Part 1, does not include the general economic loss to the community because of uneconomic use of potential productive labor, Part 9 outlines these indirect losses. The criminal and the prisoner cause an indirect loss to the community because they are not producers. The fact that criminals exist causes another indirect loss, the labor of persons employed in combating crime and in protecting the community from its consequences. No attempt is made to estimate the wealth-producing power of persons engaged in crime. On the basis, however, of an average daily prison population of 145,000, of the average labor income per worker in the United States in 1927 ($1,205), and of an estimated 50 per cent utilization of prison manpower in prison industries, the figure of $87,000,000 per year is used to indicate the probable order of magnitude of the loss of productive labor of imprisoned criminals.

The man power devoted to the public administration of criminal justice in this country is estimated at 170,000 persons working full time. At an assumed average earning power of $1,384 (the average of wage workers and salaries employees in industry), the annual loss of productive labor of such persons works out at approximately $235,000,000. Of course, the actual loss is quite impossible of determination or of accurate estimate.

The *public* expenditures for the administration of criminal justice (i. e. expenditures by federal, state and city governments) are added together to show a total in excess of $350,000,000 a year.[6] But to make an accurate estimate of the total economic cost of crime to the United States is declared wholly impossible. "Many 'estimates' of total cost have been made, but they, in our opinion, have only been guesses and we do not feel that any useful purpose would be served by still another guess."

The relative expenditures for various agencies dealing with criminal justice lead to the following conclusions: (1) The preponderant share of the total funds used for criminal justice purposes which is expanded for police (68.1 per cent of federal expenditures and 78.3 per cent in the cities) emphasizes the desirability of active measures to increase police efficiency. (2) The relatively large amounts of public funds disbursed for the support of penal institutions, as compared with the relatively small amounts expended for probation calls for investigation of the possibility of employing probation in the case of some criminals now confined in institutions. (3) The relatively small part of the cost of criminal law enforcement represented by expenditures for prosecution gives rise to the query whether enough is being spent on prosecuting agencies in view of the very large importance of efficient prosecution in securing adequate law enforcement.

Other conclusions are (1) that the cost of administering criminal justice is relatively small in comparison with the economic losses to individuals and to the community resulting from crime. Therefore

5. The *Manual for Studies of the Cost of Criminal Justice in American Cities* outlined in detail how carrying charges on capital invested in property used in connection with the administration of criminal justice were to be computed. Unfortunately, the task of computing such charges proved hopelessly difficult in many cities. These charges were available, even in part, for only 47 of the 800 cities studied.

6. No estimate is made for items omitted or cities for which reports were not secured, but the reader is kept fully aware of all such omissions.

(2) it is more important, from an economic standpoint, to increase the efficiency of the administration of criminal justice than to decrease its cost. But (3) "the cost of administering criminal justice might be substantially reduced by a thorough overhauling of the criminal code which would result in the elimination from our penal codes of legislation of doubtful social utility or obvious unenforceability."

The report closes with a restatement of the recommendations which have been incorporated in this review: improvement of financial statistics; completion of the study of municipal costs; studies of commercialized fraud, racketeering and organized extortion, and of methods of reducing the economic burden on jurors and witnesses in criminal cases. The argument is summarized: "We believe that the carrying into effect of these recommendations, in addition to supplying important data as to the economic aspects of crime, will produce results of substantial value in dealing with important problems of law enforcement and observance. Of course such recommendations merely touch the edge of the problem. The heart of it is in the human engineering required in fighting the development of the criminal and aggressively seeking his rehabilitation."

The *Report on the Cost of Crime* is a valuable collection of information such as has never been gathered before, a handbook of immediate use to students and research workers. But its value should not stop there. Here is a criticism of the raw materials and sources of cost of crime statistics, a challenge to state and city governments to introduce better methods of cost accounting and to the Federal Government to standardize state and institutional reporting and centralize its federal cost reporting. Here are statistics which may prove the beginning of wisdom in stimulating studies of the comparative efficiency of different city organizations and of various institutions. It is to be hoped that the Commission's plan for continuing research will be taken up by city administrations, municipal research bureaus, and private research organizations.

DEPARTMENT OF CURRENT LEGISLATION

Criminal Legislation of 1931—Continued

BY JOSEPH P. CHAMBERLAIN

SPACE prevents citing all the criminal legislation passed in the full legislative year of 1931. Many laws enforcing business conduct by criminal sanction are not included. The aim has been to classify the various types of legislation, so that members of the Bar can get some notion as to the tendency towards increasing or decreasing punishment, adding to or restricting freedom of courts to sentence; and new offenses or classifications which are deemed worthy of special attention.

Means and Prevention of Crime

The disarmament movement is popular with the legislatures. Whatever may be thought as to the importance of being armed to preserve national rights, and incidentally to preserve the peace internationally, the legislatures, led by the police departments, appear to be quite convinced that internal peace and the rights of individuals will be better protected through limitation of armaments. The weapon especially aimed at in the statutes of 1931 is the machine gun, defined in the New York act, Ch. 792, as "a weapon of any description, irrespective of size, by whatever name known, loaded or unloaded, from which a number of shots or bullets may be rapidly or automatically discharged from a magazine with one continuous pull of the trigger." The law containing this definition makes it a felony to possess or use a machine gun, and the legislature of Illinois, p. 452, adds a prohibition against dealing in or giving away such weapons, but limits the statute to guns firing more than eight cartridges successively. North Dakota, Ch. 178, also prohibits possession, sale and use of machine guns, sub-machine guns or automatic rifles firing five or more shorts to the second. California which had already prohibited the possession of machine guns, by Ch. 1050, prohibits their sale or transportation. The importance which the legislatures attached to their action is evident from the penalties for violation. In New York possession or use of a machine gun is a felony. North Dakota also makes breach of the act a felony and fixes a penalty not to exceed ten years or $3000 fine or both. Delaware can see no object in allowing any private person to have a machine gun, and so dismisses the subject by a short act, Ch. 249, under which it will be unlawful for any person except members of the state military or of a police department to possess a machine gun. Illinois makes the penalty for unauthorized sale, purchase or possession, imprisonment from one to ten years which is increased from three to ten in case of a person previously convicted of certain serious crimes. California increases the penalty for possession from a maximum imprisonment of three years to a maximum of five and applies the same rule to its new offenses. The use of such weapons in committing crime is discouraged by an additional penalty. In Illinois a person who commits certain crimes while armed with a machine gun, must be imprisoned for a term of from five years to life. Provision is made in the statutes for the granting of licenses under very strict conditions. The acts do not apply to peace officers and the military. An interesting enforcement provision is contained in the Illinois law

authorizing the issuing of warrants of search and seizure for machine guns, in the same way as in the case of stolen personal property. It would appear, however, to be false economy to permit seized guns to be sold to persons authorized to carry them, rather than to have such guns destroyed and thus reduce the visible supply.

Another weapon of offense discriminated against is the bomb. North Dakota includes it in the act prohibiting machine guns, and California, Ch. 470, makes the possession or transport of tear gas bombs or cartridges punishable by not more than two years in the state prison or $2000 fine or both, but expressly permits the superintendent of criminal identification to issue permits for these weapons, and also allows their use on permit for defense as part of a protective system for specified places. Their sale is strictly regulated and can only be made to persons holding licenses. Washington, Ch. 111, declares it to be a felony to have in possession a bomb filled with explosives with the intent to use it for an unlawful purpose. The crime is punished by imprisonment of five to twenty-five years. Apparently the use of substances generating bad odors is spreading as a means of annoyance and interference with business. The statutes prohibiting these actions are as widely spread as California, Ch. 798; Minnesota, Ch. 86; Oregon, Ch. 349. Texas, Ch. 167, and Alabama, No. 137, expressly condemn a specific means of committing this nuisance. "Stink bombs," the manufacture or possession of which, as well as the use, is forbidden. Alabama takes the offense more seriously than Texas, as her law considers a breach as a felony, while the Lone Star legislators were satisfied by a fine of $100 to $1000, up to twelve months in the county jail, or both.

New York, Ch. 783, extends the war on pistols by forbidding pawnbrokers to receive in pawn any of the weapons which a person is prohibited to carry without a license, including firearms and machine guns. Texas, Ch. 267, modifies her sales law requiring dealers in pistols to pay a state occupation tax of 50% of gross receipts to requiring an annual tax of $10, authorizing the counties to collect another $5 tax. An interesting addition to the law makes it a misdemeanor to sell a pistol to a minor, or to "any other person under the heat of passion," and also prohibits any person who has served a sentence for felony from purchasing a pistol. Pennsylvania, by Ch. 497, has adopted the Uniform Firearms Act. New Jersey, Ch. 90 recognizes the criminal implications of pistol selling by transferring control of the business from the Secretary of State and clerks of municipalities to police officials.

Montana, Ch. 80, makes an oblique attack on theft of farm animals or poultry by a direct attack on the means of theft. The statute forfeits vehicles used for transportation of stolen animals or poultry. Colorado adopts a roundabout way of stopping theft of livestock. Chapter 162 makes unlawful the transportation of cattle or carcasses by motor vehicles unless accompanied by a bill of sale or written permit signed by the owner or an official brand inspection certificate issued by a duly authorized stock inspector who may refuse the certificate unless he has proof that the person requesting it is the lawful owner. Inspectors may stop and inspect such vehicle and demand the papers and may arrest any person in charge who cannot produce the papers, and take charge of the animals or carcasses. Chapter 163 is a general act requiring those in charge of vehicles to have and show peace officers written permits for the conveyance of livestock and poultry thereon. Aircraft come in for special treatment in Colorado by Chapter 97 which prohibits hunting wild fowl. Idaho, Ch. 179 makes it a misdemeanor to ship by plane game or furbearing animals.

Another case of enforcing the law through control of transportation is Wisconsin, Ch. 404, regulating the cutting of Christmas trees, evidently to prevent theft. The act requires the written consent of the owners of the land before the trees are cut, and compels a person in charge of the cutting and removing of the trees to have a permit which he must show to officers of the Department of Conservation. A shipper of such trees outside the county must have a license from the Commission. Control of the licensed dealer is set up by prohibiting his receiving trees from any vendor without a statement of the written consent of the land owner. The statement of consent must be kept for at least six months and open to the commissioner or his deputies.

The legislatures are not only trying to keep from the criminal the use of the means which machine civilization has made available to him, but are also trying to use these means to protect society. The latest dodge is the use of the radio. Iowa, Ch. 241, has authorized the Attorney General to provide for a special radio broadcasting system for police work and when it has been established, requires receiving sets in sheriffs' offices. Budget experts take notice that this installation must be at no expense to the state. Illinois, p. 460, allows the Department of Public Works and Buildings to acquire and operate radio stations for police purposes, and the distribution of receiving sets to peace officers. Telegraph and telephone companies must give priority to messages or calls directed to the broadcasting station, subject to punishment as a misdemeanor if they fail in their duty. To prevent ambulant criminals cutting in, the law forbids an automobile being equipped with a short wave length radio receiving set without permission from the sheriff. The sending of false or misleading messages to a broadcasting station is made a misdemeanor.

Organizing for the suppression of crime on a state basis is most marked in the legislation setting up or improving bureaus of identification. Kansas, Ch. 178, creates a bureau of the usual sort, providing for cooperation with the National Bureau of Identification and requiring the University of Kansas and other state departments to aid by analysis of handwriting or in any other way. Both Montana, Ch. 151, and Illinois, p. 464, set up bureaus with a provision for cooperation with other states and Washington. Massachusetts, Ch. 350, directs the Commissioner of Public Safety to provide means for identifying criminals, and to inform police departments and prosecuting officers. Reciprocity is recognized by permitting him to furnish identification of criminals to departments in other states. Alabama, No. 411, makes a beginning by requiring the establishment of a bureau of identification in counties of a specified population, under the sheriff. Michigan, No. 197, extends the

use of its bureau for publicity purposes by requiring the director to publish reports and releases to show the crime situation and the operation of the agencies of justice. He is also made a legislative aid as he is asked to recommend measures for the better enforcement of the criminal law. Maine, Ch. 246, extends its act from persons convicted of felony to persons convicted "of crime," with the distinction that where a person is convicted of a felony, he is automatically reported, whereas for a lesser crime, the approval of a judge is necessary.

Another line of the state wide protection against crime is Oregon, Ch. 139, which sets up a Department of State Police under a superintendent appointed for four years by the Governor and removable after hearing. The superintendent appoints a deputy and members of the force, and with the approval of the Governor the superintendent may set up a detective bureau to cooperate with the police and maintain fingerprint records and other information. There is the usual requirement that the department shall not interfere in labor troubles, with the interesting provision that no member shall execute a writ or order of injunction in any action involving labor disputes. The state prohibition officer is abolished and his duty vested in the state police.

Penalties—Increase or Decrease

The most striking instance of an increased penalty is Michigan, No. 2, which re-established the death penalty in murder cases. The method to be used was electrocution. The Act, however, was submitted to the people who on referendum reversed the judgment of their representatives so the Act is not in effect. Texas contributes two striking cases of increase of penalty. Grave robbing was formerly punished by fine but the legislature found that this punishment was not severe enough, that many graves were being unlawfully disturbed, so by Chapter 268, it permitted infliction of a penitentiary sentence of not more than twenty-five years, or a jail term of not more than twelve months or a fine of not more than $500, or both fine and imprisonment. This act is a striking case of the point to which attention has been frequently called, the wide discretion in extent of punishment given to the court and the consequent power of adjustment of the punishment to the criminal. There is no minimum in this act. Chapter 10 raises a rather light punishment for threats to extort money, to confinement in the penitentiary for not less than five nor more than twenty-five years. Connecticut Chapter 335, raises the maximum for assault with intent to kill from five to ten years, the minimum remaining unchanged. Maryland, chapter 449, adds a third alternative to the punishment for assault with intent to commit rape. The former law authorized a sentence of death or two to twenty years' imprisonment and the new statute allows the court the further alternative of life imprisonment. An interesting bit of social criminal legislation is New Hampshire, Chapter 58. Formerly the two social crimes of incest and adultery had the same punishment. The new law distinguishes by greatly increasing the punishment in case of incest, doubling the fine to $1000 and increasing the maximum imprisonment from three to twenty years. Another social offense was passed upon by the Maryland legislature which in Chapter 448 increased the maximum penalty for family desertion from one to three years and made the period of probation three years. A serious social problem was given more serious treatment by Pennsylvania No. 52, which doubles the maximum punishment for procuring a female person to be a prostitute. The old punishment was a maximum of five years, the new is ten. The same ten-year punishment is inflicted on any man who has any part in putting his wife in a house of prostitution or who attempts to hold a woman in such a house because of debt, or who transports women for prostitution. For the crime of transportation the person may be convicted in any county or city through which he has taken the woman. The Idaho stock raisers found that a minimum penalty of $25 for alternating marks or brands was not working out and the legislature, Chapter 23, raised it to $100, leaving the maximum at $300. The imprisonment also was for a maximum of six months; the new law inserts a minimum of sixty days. It would seem that the courts were too lenient in sentences.

Several states reduced either minimum or both minimum and maximum penalties. Most notable is Act 39 in Hawaii which abolished all minimum terms for felony at one fell swoop. In a special case, Act 5, statutory rape, the territory permits its courts to sentence to any number of years instead of giving them the hard choice between death or life imprisonment. Colorado, Chapter 81, reduces the minimum term of imprisonment for robbery to one instead of five years, and for more serious types of robbery, from ten to two years. The act also permits the court to sentence a person under twenty-one convicted of robbery, either to the reformatory or penitentiary, and if he is sent to the penitentiary, allows the court discretion to sentence him for any period between one and ten years. Alabama, Chapter 649, reduces the term of imprisonment for untrue advertising from one year to sixty days. Arizona, Chapter 97, reduces the penalty in certain game laws, changing specified offenses from felonies to misdemeanors. California, Chapter 713, strikingly reduces the penalty for unlawfully poisoning cattle of another from imprisonment in a state prison up to three years or in a county jail up to one year and a fine up to $500, to imprisonment in a county jail not over six months or both. Nevada, Chapter 58, also shows a weakening in the protection of livestock by making an offense against the law regulating the preservation of hides of slaughtered cattle to prevent theft, a misdemeanor, in place of a felony, with a maximum punishment of fourteen years in state prison.

The tendency toward closer sub-classification of crimes is in evidence in 1931. A notable case is New Mexico, Chapter 34, which creates as a separate class of embezzlers, those who were guardians or executors appointed by a court, or trustees under an express trust and in case of conviction providing a punishment of imprisonment from one to ten years or a fine of not more than $1000, or both. Indiana, Chapter 159, sub-divides embezzlement also by making a class of embezzlers of property of $2000 or more, who are to be imprisoned from five to fifty years, while the term for the other embezzlers is from two to fourteen years. South Carolina, No. 242, makes a sub-division of manslaughter by setting off the case where the jury

returns a verdict of guilty of involuntary manslaughter, and fixes the punishment at not more than three years "in the discretion of the judge," whereas the former punishment was from two to thirty years. As there is no minimum, this gives the jury a wide power to fit the punishment to the criminal. The Palmetto state also discriminates, by No. 251, in case of larceny of a bicycle which was formerly punishable "at the discretion of the courts," by limiting that discretion where the value of the bicycle is not more than $20 to imprisonment for not more than thirty days or a fine of not more than $100. The classification principle is maintained in Oklahoma, Chapter 15, decreasing the minimum penalty for perjury in criminal trials from ten to two years and decreasing the penalty on any other trial from five years to one. These lowered minimums may make convictions easier. Arson is more closely defined and more serious penalties are imposed by Florida, Chapters 15602, 15603 and 15620, Texas, Chapter 82, and Utah, Chapter 46.

Interesting cases of changes in penalty which are not easy to classify are Connecticut, Chapter 206, and California, Chapter 223. The Connecticut act makes guilt personal. It amends an act limiting the amount of a loan which can be issued by a bank, by omitting the former provision requiring the bank to forfeit $3000 to the state for each violation and putting emphasis on individual officials by increasing the penalty for violation in their case from $100 to $1000. The California law permits defendants in misdemeanor cases to pay their fines in installments or within a limited time, and where they are imprisoned in default of payment, cuts in half the term of imprisonment by raising the value of a day's time from one dollar to two dollars.

A situation similar to that of the prohibition law where both state and federal government made the same act unlawful may develop as a result of the punishment by both jurisdictions of the same acts in air navigation. Oklahoma in her aircraft law, Chapter 50, avoids this danger by expressly providing that acts or omissions made unlawful by the state law "shall not be deemed to include any acts or omissions which violate the laws or lawful regulations of the United States" but the defendant must prove that he is amenable to prosecution under the federal law as a matter of defense.

Crimes

Attention was devoted by the lawmakers to the crimes in respect to banks. It is not surprising that there were a number of statutes or amendments to statutes penalizing rumors in respect to financial institutions. Maine, Ch. 40, punishes by a fine of $1000 or imprisonment for 11 months or both, malicious making, publishing or circulating false reports concerning any financial institution, bank or trust company, including building associations. New Hampshire, Ch. 99, adds counselling, aiding, procuring or inducing another to start or circulate such a rumor and makes the cost a fine of from $200 to $1000 or imprisonment not more than one year or both. Wisconsin, Ch. 459, adds to the financial institutions protected by the law domestic mutual insurance companies, and North Dakota, Ch. 132, makes a misdemeanor the crime of slander and libel of annuity, safe deposit, surety and trust companies, or inducing another to spread such rumors. The act forbidding the issuing of checks without funds was broadened in New York, Ch. 665, to include the issuing of such checks on behalf of the issuer or any other person or as agent or representative of another or as officer or agent of a corporation.[1] Utah, Ch. 28, also includes agents and officers of corporations. Alabama, No. 550, also amends her bank check act by requiring the court, unless the property has been returned or the value paid, to assess the value of each article as an item of costs to be paid as other costs. Texas, Ch. 16, makes the loan of trust funds by a bank or trust company to a director or officer or employee a felony, punishable by imprisonment from two to ten years.

Protection primarily of banks from outside violence is the subject of Nevada, Ch. 107, which makes it a felony punishable by death or life imprisonment in the discretion of the courts, to unlawfully take or attempt to take securities, money or other personal property in the custody or control of a financial institution from a person by means of force and violence or through fear of injury, immediate or future, to such person or property or the person or property of another. The act applies only if the person is armed with a dangerous weapon or is aided by an accomplice or by the use of a motor vehicle, or actually inflicts bodily harm on the person he is robbing. Arizona, by Ch. 37, adorns her statute books with the crime of "burglary by means of mechanical devices," punished by imprisonment for not less than five years. The crime is committed by a person who with the use of explosives or other burning or mechanical device opens or attempts to open a safe designed for keeping money or valuables.

Among new crimes of violence most prominent are the provisions of Michigan, No. 2, and Maryland, Ch. 400, including as murder in the first degree a homicide in escaping or attempting to escape from a penal institution, and Michigan adds, while being transported to or from such institution. Michigan further makes murder in the first degree a homicide committed in kidnapping or attempting to kidnap for ransom. Nevada, Ch. 96, adds to the cases where homicide is justifiable, when the person killed was engaged in the commission of a felony or an attempted felony or was fleeing or resisting lawful pursuit and arrest, provided he is killed within twenty miles of the premises where the felony was committed or attempted. Texas, Ch. 57, as part of a statute punishing interference with air craft, airport or beacons, provides that in case death results from one of the prohibited acts the offense shall be murder. Other cases of violation are punished by imprisonment from one to five years, a fine of $25 to $1000 or by confinement in the county jail for not less than one year. This range in penalties is a necessary consequence of the wide scope of the act which includes throwing stones at aircraft or shooting at them or putting up false lights or signals to deceive aircraft operators. Texas, Ch. 12, makes kidnapping for ransom a capital felony, punishable by death or imprisonment in the penitentiary for not less than five years. The

1. People v. Fleischman, 232 N. Y. S. 187, held the old section not applicable to the officers of a corporation, so this amendment was necessary.

legislature wisely provides an inducement for repentance by limiting the punishment to confinement for not less than five years where the person kidnapped is returned without serious bodily injury being inflicted.

An interesting modification of burglary is contained in California, Ch. 949, which omits the old requirement that a burglar must break into a building to be guilty of the felony of burglary with explosives. This puts this serious kind of burglary in line with other forms of burglary in California. Wisconsin, Ch. 29, amends the act relating to assault with a dangerous weapon so as to include "any firearm, whether loaded or unloaded," thus changing the decisions to the effect that an unloaded revolver was not necessarily "a dangerous weapon."[2]

Delaware, Ch. 268, defines sedition and punishes it as a felony, "but no person shall be convicted of sedition unless on the testimony of two witnesses to the same utterance, conduct or act or on confession in open court."

There are a few interesting statutes relating to the relations of men and women. Texas found that her bigamy statute punished only persons who married in the state while having a former wife or husband living. Chapter 9 took care of another situation by making it an offense for a person to cohabit with a husband or wife whom he has married without the state, when he had another spouse living. So for the future, a man can not commit bigamy outside the state and in security live with the second wife in the state. North Carolina, Ch. 57, enforces the responsibility of a parent by making it a misdemeanor for a mother wilfully to abandon her child under 16, whether legitimate or illegitimate.

California, by Ch. 732, adds a new kind of theft to its list of crimes. Copying of records relating to real property used in the title insurance business and belonging to one in that business is the offense, as is the act of any other person who gets from the thief any such paper. The value of these papers is fixed at the cost of acquiring and compiling them. Another interesting business crime is connected with Minnesota, Ch. 294, regulating the storage of grain on farms and the method of procuring loans thereon. The law provides for sealing by the State Commission of a bin where grain is stored and it is made a felony to break the seal of the bin without the order of the commission, or to take any grain except for actual delivery to the holder of the appropriate certificate.

The wide use of slot machines for selling tickets or merchandise is reflected in the many criminal statutes making the cheating of such machines a special offense and punishing the possession of spurious slugs or tokens.[3] It is of interest that the legislation against gambling devices such as Alabama, No. 671, is countered by Nevada, No. 99, that permits the licensing of gambling games. License must be either mechanical or card. The sheriff is the licensing officer and an attempt is made to protect the honor of Sagebrush temples of chance by prohibiting with severe penalty thieving games.

2. Lipscomb v. State, 130 Wisconsin 238; Mularkey v. State, 201 Wisconsin 430.

3. Penna. No. 364; Kansas, Ch. 179; Texas, Ch. 84; North Dakota, Ch. 133; California, Ch. 1200; Ohio, p. 118.

Evidence

The legislatures are obviously convinced of the importance for the enforcement of criminal law of setting up presumptions or of making certain facts prima facie evidence of other facts or states of mind. The courts are not altogether favorable to these presumptions and require that they must not be arbitrary. "State legislation declaring that proof of one fact or a group of facts shall constitute prima facie evidence of the main or ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be inferred. If the presumption is not unreasonable, and is not made conclusive of the rights of the persons against whom raised, it does not constitute a denial of due process of law."[4]

Intent, which may be very difficult to prove, is inferred from facts which can be much more easily shown. In Pennsylvania, No. 1361, punishing the making of certain statements concerning national financial institutions makes the falsity of the statement or rumor spread, prima facie evidence of intent to violate the act and goes on to say that neither the source of the information or belief of the person charged in its truth, nor lack of intent to do injury to the institution, shall be a defense. Iowa, Chapter 240, is a familiar act making it a misdemeanor to mutilate manufacturers' serial numbers; the possession of an article with the serial number mutilated raises a presumption, which is not conclusive, that the mutilation was unlawful. Washington, Chapter 111, making it a felony to possess a bomb filled with explosives with intent to use it for unlawful purposes, might be very hard to enforce if the intent had to be shown. The legislature has made easier the task of the prosecuting attorney by declaring that possession or control of the bomb is prima facie evidence of such intent. Alabama, No. 137, forbidding the manufacture of stink bombs, smoothes the path to a conviction, by allowing to be shown as prima facie evidence of the offense, the possession of "any of the ingredients commonly used" for the malodorous crime. Texas, Ch. 270, establishing the misdemeanor of entering a citrus orchard with intent to steal fruit, puts the burden of showing an honest purpose on the person who is found entering an orchard with a motor vehicle, or entering or being in the orchard with any containers which might transport the property, or at night, without the consent of the owner, entering or being on the premises with a motor vehicle, its lights unlighted. Being found under any of these circumstances is prima facie evidence of intent to steal.

Another type of act implies the breach of a statute from the situation in which a person is found. New York, Chapter 792, makes the presence of a machine gun in any room, dwelling, structure or vehicle "presumptive evidence of its illegal possession by all the persons occupying the place where it is found." Hawaii, Act 134, strengthens an existing law forbidding destroying of imported birds or disturbing their nests, by making any person found with a trap or snare in his possession, or found at night with a light searching for birds "in

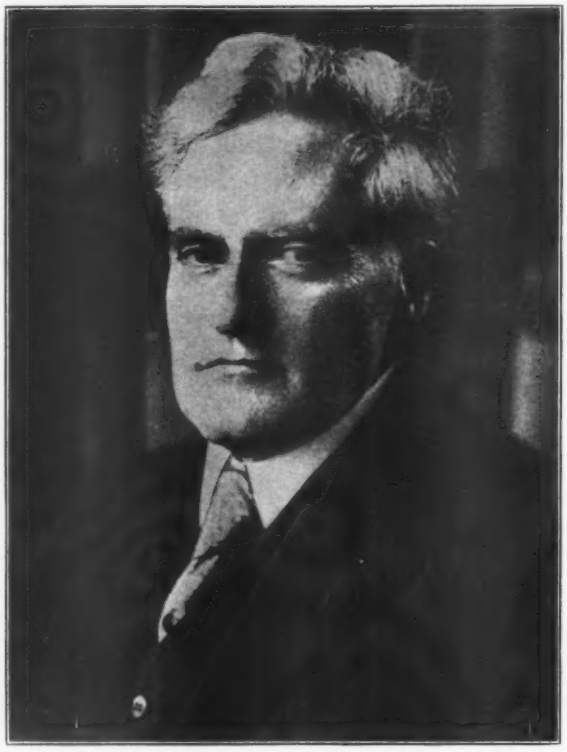
4. Manley v. Georgia, 279 U. S. 1, 5; 73 L. Ed. 575, 579. See also People v. Mancuso, 255 N. Y. 463. See Presumptions as First Aid to the District Attorney, A. B. A. J., May, 1928, p. 287.

(*Continued on page* 204)

ONE ASPECT OF JUDGE CARDOZO'S NOTEWORTHY CAREER*

By Henry W. Taft

FOR twenty-three years this Association has been engaged in organized efforts to improve the administration of the law and to maintain and elevate standards of professional conduct. We have also cooperated in efforts to maintain the judiciary on a high level of character and efficiency; and tonight we signalize the career of Judge Cardozo, the Chief Judge of the Court of Appeals. Many things have made that career noteworthy. I speak tonight of but one,—the leadership in his own court, through which generally he secures unanimity among his associates. Four to three decisions have been rare and the occasional dissenting opinion has not often been so copiously buttressed or so unrestrained in expression as to impair the force of the prevailing decision. It is this accord in the court that has given to its decisions weight and authority in all jurisdictions.



Hon. Benjamin N. Cardozo
Underwood and Underwood

Chief Justice Hughes said the other day that "The Chief Justice as the head of the court has an outstanding position, but in a small body of able men with equal authority in making decisions it is evident that his actual influence will depend upon the strength of his character and the demonstration of his ability in the intimate relations of the judges." And of Judge Cardozo it may be said that his influence among his colleagues springs from his elevated character, his disinterestedness, his thorough scholarship in law and literature, his logical processes and his engaging personality. Then how kindly he suffers all kinds of men and with what mastery he meets opposing views! For, as he has said, he would not expect that his associates should "glide into acquiescence when negation seems to question our own kinship." But he would awaken among them "a sense of fellowship . . . in the deliberative process."

John Marshall, perhaps less learned in the law than Judge Cardozo, was able for the thirty-five years of his incumbency, to bring all the Justices of the Supreme Court to the support of the great principles of constitutional law. In the unanimous decisions of such cases as *Marbury v. Madison, Gibbons v. Ogden,* and *McCulloch v. Maryland,* questions vital to the continuance of our national existence were involved. They were decided, with hardly an exception, by a unanimous court, although the decisions ran counter to the political views of powerful statesmen of the day. They were bitterly assailed by Thomas Jefferson, John Randolph and others of the so-called Republican Party, who did not hesitate to assert that the court was usurping the power of the executive and the legislative departments. And that its decisions were unanimous did not deter Jefferson from saying that they were "huddled up in conclave, perhaps by a majority of one, delivered as if unanimous, and with silent acquiescence of lazy or timid associates, by a crafty Chief Judge who sophisticates the law to his mind by the turn of his own reasoning."

But against all political opposition the decisions became embedded in our system of constitutional jurisprudence and undoubtedly through Marshall's influence. In *United States Bank v. Dandridge,* in January, 1827, after he had been Chief Justice for more than a quarter of a century, in a dissenting opinion, of which he delivered only two, he said:

"I should now, as is my custom when I have the misfortune to differ from this court, acquiesce silently in its opinion, did I not believe that the judgment of the Circuit Court of Virginia gave general surprise to the profession and was generally condemned."

And it is interesting to note that Justice Holmes in the *Northern Securities* case, said that he thought it "useless and undesirable, as a rule, to express dissent." But in recent years dissenting opinions have been raised in glory. Some biographers even make them the basis for appraising judicial distinction; and one wonders whether judges of really great qualities are content that in estimates of their judicial service the chief emphasis should be placed upon the frequency with which they have differed from their colleagues.

By publicists, journalists and magazine writers, judges are being classified as progressive and conservative; and generally progressive judges are associated with dissenting opinions. The terms "liberal" or "pro-

*Address delivered at Annual Dinner of the New York County Lawyers' Association on Thursday, Dec. 17, 1931.

gressive" have connotations of wide range. It is easier to apply them to a legislator, who enacts laws, than to a judge, who interprets them. But I suppose that all progressives would claim Judge Cardozo as one of them. Certainly, he not only looks backward but also forward; within his vision neither the rights of property nor the exigent needs of humanity are obscured; and he does not remain static. But despite all that, he is not a judicial dissenter; and he believes that progress may be achieved by concord rather than by negation. His associate, Judge Pound, has said of him that his "persuasive progressiveness . . . seldom leaves him in the role of a dissenter." And that this is true is attested by the record which shows that in 17 years he has written 555 opinions of the court and only 14 dissenting opinions, an average of less than one a year.

Some states have inflicted upon their judges the cruel and inhuman punishment of prohibiting dissenting opinions,—a crude and humiliating device of doubtful constitutionality. But a dissent may stimulate thought as to whether the law does not need revision to bring it into harmony with existing conditions. Both written and unwritten, it theoretically adjusts itself to the needs of a developing civilization. But such adjustment moves "with wandering steps and slow"; and in pointing out, even though prematurely, to the slow moving courts and to the even more sluggish legislatures, the way to a result more consonant with changed conditions, a dissenting judge may perform a useful service. Judge Cardozo himself has said:

> "The dissenter speaks to the future and his voice is pitched to a key that will carry through the years. Read some of the great dissents of opinion, for example, of Justice Curtis in *Dred Scott v. Sandford*, and feel after the cooling time of the better part of the century the glow and fire of a faith that was content to bide its hour. The prophet and the martyr do not see the hooting throng, their eyes are fixed on eternity."

But a habit of dissent may be pressed too far. In the Pollock case, Chief Justice White, in dissenting, said that "the only purpose that an elaborate dissent can accomplish, if any, is to weaken the effect of the majority and thus engender want of confidence in the conclusions of courts of last resort." But so far as it stimulates thought as to whether obsolete rules may be discarded and the law made to minister better to the social, political and economic needs of the age; or if it suggests to the legislature that outworn conventions should be abandoned, it may, in a court of last resort, serve a useful purpose. In dissenting opinions that go further, Judge Cardozo has himself pointed out some of the inherent weaknesses. He says:

> "Comparatively speaking at least, the dissenter is irresponsible. . . . He has laid aside the role of the hierophant, which he will be only too glad to resume when the chances of war make him again the spokesman of the majority. For the moment, he is the gladiator making a last stand against the lions. The poor man must be forgiven a freedom of expression, tinged at rare moments with a touch of bitterness, which magnanimity as well as caution would reject for one triumphant. . . .
>
> "We need not be surprised, therefore, to find in dissent a certain looseness of texture and depth of color rarely found in the *per curiam*."

But it is true that dissenting opinions often have a fervor of their own, sometimes perhaps, provoked by the complacence of the majority. But the form and force of the dissenter's expression and his method of argument, are too often seized upon as a text by those impatient of the legal restraints upon their noble impulses. Irrelevant economic, industrial or social views expressed in dissenting opinions, often afford diverting reading; and their eloquence makes an impression on the impatient layman, who "will not wait upon the lagging years," on the young student and on the radical theorist; and they evoke uninformed and destructive criticism of the courts and of the law.

May we not then attribute the great influence of Judge Cardozo, not alone to his erudition in the law, his power of exposition, his judicial temperament, his broad culture, but also to his leadership in his own court, which has constantly, during the period of seventeen years, made its decisions increasingly influential as precedents, because upon vital questions arising in the complex civilization of this empire state, they have been accepted by the people as finally settling the law?

Two Judicial Councils Abolished

IN the December issue of the Journal of the American Judicature Society is an account of the abolition by statutory repeal of the Judicial Councils in Oregon and North Carolina. The Oregon Judicial Council, the article states, was one of the two earliest, but the statute creating it in 1923 erred in making the Chief Justice of the Supreme Court the chairman of the Council. Notwithstanding the lack of sympathy with the idea in Oregon, it adds, the Council did some excellent work, or rather permitted it to be done by Mr. Albert B. Ridgway and other Bar Association leaders.

North Carolina, it seems, in repealing the Judicial Council Act adopted a substitute plan which is not without promise. "When North Carolina created its judicial council in 1925," we are told, "it departed from other forms by making a council comprising all the judges of the state and enough practitioners to make a total of fifty. This organization was too cumbersome. Some good work was done, but against strong odds. There appears to be no ground for regret that the legislature this year repealed the act and adopted a new law which is certain to yield larger returns for judicature. It creates a Commission for the Improvement of the Laws, comprising the attorney general, chairmen of the two judiciary committees of the legislature, two supreme or superior court judges, two practitioners, a professor from each of three law schools, and two laymen. The governor appoints all but the ex-officio members. This interesting body differs from other judicial councils in that its scope of work extends to the entire field of legislation. From the judicial standpoint it appears unfortunate that its work is not limited to judicial administration, but there are features which mitigate this regret."

Treaties and Other International Acts of the United States of America

Volume 2 of the above series has just been compiled and is ready for sale by the Superintendent of Documents, Washington, D. C. It covers the period from the Declaration of Independence, July 4, 1776, through 1818. The earliest treaties printed are those with France of February 6, 1778, and the latest is that with Great Britain of October 20, 1818, a period during which some of the most important treaties in the history of the United States were made. The price of the volume is $4.00.

AMERICAN BAR ASSOCIATION JOVRNAL

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JOSEPH R. TAYLOR,
MANAGING EDITOR

Journal Office: 1140 N. Dearborn Street
Chicago, Illinois

THE CARDOZO APPOINTMENT

The appointment by the President of Benjamin Nathan Cardozo to the place on the United States Supreme Court made vacant by the resignation of Mr. Justice Holmes is one which has evoked spontaneous and enthusiastic approval.

There is an interesting parallelism in the selection of these two men for service on the highest court of the nation.

Prior to his appointment to the high office which he has so recently resigned after thirty years of illustrious service, Mr. Justice Holmes for twenty years had been a member of the Supreme Judicial Court of Massachusetts and during the last ten years of that period adorned the office of Chief Justice of that great tribunal.

Prior to his appointment to the same high office, Justice Cardozo has served with great distinction for eighteen years on the Court of Appeals of the State of New York and for one third of that period as Chief Judge of that court.

Each of these men has had a juridical philosophy of his own, each of them regards the law and the constitution as living, growing organisms to be interpreted in the light of the present, and each of them expresses his ideas in language which exemplifies the perfection of a literary style marked alike by beauty and power.

A great career now opens upon a larger field. No one can doubt that it will be marked by most distinguished service.

PRESIDENT THOMPSON'S LETTER

The Association must either go forward or backward. It cannot stand still.

It must go on increasing in number and influence for good and for service to the profession, or it must decline in strength and fail correspondingly to discharge its responsibilities.

President Thompson's personal appeal to each member to secure at least one applicant for membership points out a practical way in which the individual can help his Association.

That appeal has only recently been sent out. The response even at this early date has been gratifying. It will swell in volume and significance with every passing week from now on.

It is a practical way to help. Many a member, realizing the dignity of the ideals of the profession as represented by the Association, has frequently asked himself, "What can I do?" There are many things to do, but here and now there is this one concrete, important thing: Get a member.

It is an easy way. It is one of the things that it is harder not to do than to do. To delay is to have a constant and irritating reminder of a refusal to do one's part constantly in mind. To act is merely to get some personal acquaintance, of whose qualifications you have no doubt, to sign the application blank and so to dispose of the matter quickly and all at once.

It is the most effective way of helping solve one of the continuing major problems of the Association. The Association is a more or less abstract thing to many a lawyer. He may know little about it and its work. But you are a concrete being to him. He knows you personally. What you say counts more than scores of letters from an unknown source.

The JOURNAL prints in this issue a "Roll of Honor." It contains the names of all those who have sent in the names of applicants to date, in response to President Thompson's letter. Each month the names of those who have come forward and done their part since the last issue will be printed.

In this issue, the Roll of Honor also contains the names of all those who have voluntarily sent in applications since the Atlantic City meeting. They, too, are certainly entitled to this recognition—since

they did not even wait until the present movement was inaugurated to make their contribution of personal loyalty and effort.

And it is and will continue to be a "Roll of Honor"—composed of men with the imagination to understand the need of just such personal effort and the loyalty to make it.

THE HALF AND THE WHOLE

According to the official report of the Ohio State Bar Association's mid-winter meeting, Mr. Province M. Pogue, of Cincinnati, "took occasion to advise the Association to concentrate its attention on a few major measures at each session of the legislature and not to repeat the mistake of sponsoring ninety-three measures, as it did with such poor success at the last session."

Sound advice, of course—and the idea of practicality which it embodies is by no means of recent origin. Hesiod put it in epigrammatic form for all time in his "Works and Days," when he said: "Foolish men! They do not know how much more the half is than the whole."

Mathematically, the statement doesn't hold. But politically, morally, economically and no doubt in many other ways, it is profoundly true. For it is a counsel of wisdom and moderation as against extreme efforts and rash ambitions of all kinds.

Certainly the concrete case of the Ohio Bar Association's legislative program, with which we began, illustrates it perfectly. Half of the program might, and probably would, have meant real results. The whole program, to judge by the statement above quoted, seems to have meant very little, as far as getting things done was concerned.

To turn to a different field, the old saying is plainly the secret of an effective style. It means restraint, giving the impression of something in reserve, not attempting to say all that is to be said, or, as colloquial wisdom has it, making one's point and then sitting down. Many a writer has spoiled a good article and a good impression by not knowing when to stop—by not realizing that half of his production might have been a success, but the whole of it was doomed to failure.

But there is further evidence of the validity of the old Greek's wisdom—though here we tread on more delicate ground. How many judicial opinions, says the Bar, could be vastly improved by reducing the length to about one-half! How many a brief, says the Bench, could be made vastly more effective by the same process! How many a lawyer, says the U. S. Supreme Court—suiting the action to the word in several instances—could avoid serious embarrassment by a more careful consideration of the proper length of the transcript of record in a case!

It is curious how many applications may be found for this saying, which naturally passed into a Greek proverb. Take Bar Association banquets, for instance. Gastronomically, many are generally heard to complain the next day of their neglect of this salutary maxim. Many banquet speakers likewise have a tendency to ignore it, to the great discomfort of their hearers and their own consequent loss of reputation. Take the matter of a lawyer urging his client to accept a fair compromise rather than insist on having everything his own way. His wisdom dates back over two thousand years.

When looking for an inscription to put on the walls of public buildings the committee in charge might well give consideration to this saying, which is so profoundly true and at the same time so generally neglected.

A CORRECTION

The article in our February issue on "Erskine-Type of the Independent Lawyer" was an address delivered before the Indiana Bar Association by Hon. Burr W. Jones, of Madison, Wisconsin, former Justice of the Supreme Court of that State. By a remarkable inadvertence it was credited to "Mr. Stiles W. Burr of Madison, Wis." Judge Jones wrote us: "Probably the change is an improvement but as I am nearly eighty-six years old I think I shall cling to the old name during the few years left me." Mr. Burr wrote us from Washington: "The address is one for which any lawyer might be glad to take credit, but I am not 'entitled.'" We regret the error but we particularly appreciate the serenity with which Judge Jones received it.

REVIEW OF RECENT SUPREME COURT DECISIONS

Power of Bankruptcy Court to Order Sale of Bankrupt's Property Free of All Encumbrances—Cincinnati Ordinance Imposing Special License Fees on Drive-It-Yourself Automobiles Not Violative of Due Process or Equal Protection Clauses—Jurisdiction of State Courts over Actions against Carriers Engaged in Interstate Commerce—State May Not Impose Inheritance Tax on Transfer of Property Having Situs Outside Its Jurisdiction—Power of Commissioner to Reaudit Income Tax Return Whenever Repayment Is Claimed—Application of Federal Employers' Liability Act to Injured Employee of Railroad Company Engaged in Both Interstate and Intrastate Commerce—Discriminatory Taxes on State and National Banks

By Edgar Bronson Tolman*

Bankruptcy—Jurisdiction of Bankruptcy Court to Decree Sale of Bankrupt's Property Free of Encumbrances

In bankruptcy proceedings the federal courts have power, not specifically granted by statute, but implied from their general equity powers, to sell real estate of the bankrupt free from all liens, including tax liens accruing prior to the bankruptcy, and to transfer such liens to the proceeds of sale.

Van Huffel v. Harkelrode, Adv. Op. 158; Sup. Ct. Rep., Vol. 52, p. 115; 18 Am. B. R. (N. S.), 730.

The principal question involved in this case related to the power of the bankruptcy court to order a sale of the bankrupt's property free of all encumbrances. The question arose in a suit in a state court of Ohio to quiet title to lands which the petitioner had bought at a sale made by the bankruptcy court. That court had ordered that all liens be marshalled, that the property be sold free from all encumbrances, and that the rights of lienholders be transferred to the proceeds of sale. Among other charges on the property were certain liens for unpaid state taxes. The bankruptcy court held that two mortgages were liens prior to the tax liens and applied the entire proceeds in satisfaction of one of them.

The State Treasurer did not by any proceedings in the bankruptcy court, question the propriety of the action of that court. The petitioner who had brought proceedings in a state court to quiet title, conceded that the decree of the bankruptcy court was erroneous in denying priority to the taxes, but urged that it was *res judicata.* The Treasurer took the position in the state court, that the decree of the federal court was a nullity for lack of power to order a sale free from encumbrances; and further, that no jurisdiction had been acquired over the state.

The trial court granted the relief sought, but the Court of Appeals reversed its judgment. The Supreme Court of Ohio declined further review. On certiorari the judgment was reversed, by the Supreme Court, in an opinion by Mr. Justice Brandeis sustaining the petitioner's right to the relief sought.

As to the power of the court to order a sale of property free from encumbrances, Mr. Justice Brandeis said:

> *First.* The present Bankruptcy Act (July 1, 1898, 30 Stat. 544, c. 541), unlike the Act of 1867, contains no provision which in terms confers upon bankruptcy courts the power to sell property of the bankrupt free from encumbrances. We think it clear that the power was granted by implication. Like power had long been exercised by federal courts sitting in equity when ordering sales by receivers or on foreclosure. . . .
>
> No good reason is suggested why liens for state taxes should be deemed to have been excluded from the scope of this general power to sell free from encumbrances. Section 64 of the Bankruptcy Act grants to the court express authority to determine "the amount or legality" of any tax. To transfer the lien from the property to the proceeds of its sale is the exercise of a lesser power; and legislation conferring it is obviously constitutional. Realization upon the lien created by the state law must yield to the requirements of bankruptcy administration. . . .

In answer to the Treasurer's contention that the sale was void as against the State for failure to give it notice and opportunity to be heard, it was pointed out that notice of the application to sell had been mailed to the Treasurer, and that he had mailed to the referee a list of taxes due.

> It is urged that such notice was insufficient; and also that a proceeding to determine the priority of liens is plenary, whereas the order now complained of was entered in a summary proceeding. . . . We have no occasion to pursue the argument. So far as appears, neither of these objections was made by the treasurer below, nor were they discussed by any of the state courts. They cannot, therefore, be urged here.

In conclusion, consideration was given to a question of practice, whether the writ of certiorari should be directed to the State Supreme Court, or to the Court of Appeals. It appeared that the Supreme Court had dismissed the writ of error on the ground that no debatable constitutional question was presented. Since this constituted a ruling of the merits, rather than a refusal to review for lack of jurisdiction, the writ would normally be directed to the Supreme Court. But some difficulty to this procedure was urged in a suggestion that the Supreme Court lost custody of the record on dismissal of the petition in error. It was noted in this connection that the State Supreme Court rules provide for a return of the record to the lower court after decision of a cause in which a final

*Assisted by James L. Homire

record is not required to be made in the Supreme Court.

> But we have obtained the record from the court whose decision we are to review, and so have no occasion to resort to any other court in order to get it. Our Rule 43 provides that the certified transcript of the record on file here shall be treated as though sent up in response to a formal writ. The case at bar should, therefore, properly be considered on the writ (in No. 55) issued to the Supreme Court of Ohio; and the writ (in No. 54) issued to the Court of Appeals should be discharged.

The case was argued by Messrs. H. H. Hoppe and Alonzo M. Synder for the petitioner and by Messrs. Gilbert Bottman, Attorney General of Ohio, and G. H. Birrell for the respondent.

Constitutional Law—Due Process and Equal Protection—Regulation of Public Vehicles

The Cincinnati ordinance imposing special license fees on "Drive It Yourself" automobiles, and requiring their owners to provide insurance or post bonds for the protection of persons or property injured or damaged by the negligence of lessees using such automobiles, does not contravene the due process or equal protection clauses of the Fourteenth Amendment.

The Hodge Drive-It-Yourself Co., et al. v. Cincinnati, et al., Adv. Op. 199; Sup. Ct. Rep. Vol. 52, p. 144.

In this opinion, by MR. JUSTICE BUTLER, the Court reviewed and affirmed a judgment of the Supreme Court of Ohio sustaining an ordinance of the City of Cincinnati regulating "driverless automobiles for hire." The ordinance classifies "autos for hire," "driverless autos for hire," and "funeral cars" as public vehicles, imposes license fees upon them, and requires them to deposit insurance policies or bonds with the city treasurer for the protection of persons injured or whose property may be damaged as a result of the negligent operation, maintenance or use of such vehicles by persons leasing them.

The appellants own and carry on the business of leasing such automobiles, to be driven by lessees in the city streets and elsewhere. It appeared that many insurance companies which formerly had carried the risks specified in the ordinance decline to issue such policies, but others are offering rates, optional to the insured, of $232.50 per vehicle, or 10% of the gross earnings which average about $1800. per year.

The appellants challenged the validity of the ordinance as an unreasonable interference with private business. They asserted that it was not a measure for the regulation of the use of streets, but that it attempted to convert them into public utilities, impose liability without fault, and it was discriminatory and oppressive.

The Court, however, found the ordinance valid as a public safety measure regulating the use of streets, rather than a measure of the type condemned in *Michigan Commission v. Duke*, 266 U. S. 520, and *Frost Trucking Co. v. Railroad Commission*, 271 U. S. 583, as an attempt to compel a private carrier to assume the duties and burdens of a common carrier. As to the propriety of the ordinance as an exercise of the police power, MR. JUSTICE BUTLER said:

> Unquestionably appellants contemplate that those hiring their cars will operate them upon the streets. In fact such use of the streets is essential to appellants' business. It is a special and extraordinary use materially differing from operation of automobiles or trucks by owners or their chauffeurs in the usual way for private ends. The running of automobiles necessarily is attended by danger to persons and property in the vicinity; and, when they are negligently driven upon city streets, the peril is great. The court below found that the operation of automobiles by such hirers is extra-hazardous to the public. The State has power for the safety of the public to regulate the use of its public highways. . . . It may prohibit or condition as it deems proper the use of city streets as a place for the carrying on of private business. This Court has sustained a state law requiring reasonable security for the protection of persons in respect of injuries and losses caused by the negligent operation of motor vehicles engaged in carrying persons for hire. . . . Such measures, so far as concerns constitutional validity, are not distinguishable from the ordinance under consideration. . . .
>
> This ordinance is not an interference with or regulation of a business that has no relation to matters of public concern; it rests upon the power of the city to prescribe the terms upon which it will permit the use of its streets to carry on business for gain. It does not attempt to impose any burden or duty that is peculiar to public utilities. . . . Nor does the ordinance attempt to make hirers the agents or employees of the owners or to make the latter liable for the negligence of the former. It merely requires the giving of security that lessees shall "respond in damage for their own tortious acts." . . . There is no showing that the conditions imposed are arbitrarily burdensome or that the measure in any way operates to deprive appellants of property without due process of law.

In conclusion, the Court pointed out that the ordinance does not, on its face, contravene the equal protection clause, and that there was no showing in the record of substantial discrimination.

The case was argued by Mr. Julius R. Samuels for the appellants.

Courts—Jurisdiction of State Courts over Actions Against Carriers Engaged in Interstate Commerce

A state court has no jurisdiction over an action brought by a resident employee of an interstate carrier by railroad for an alleged injury which occurred in another state, where it appears that the carrier is not incorporated or licensed to do business in and does not operate in the state in which the action was brought, but merely has agents in such state for soliciting traffic, and where it further appears that the trial of such action in such state would impose a burden on interstate commerce.

Jurisdiction over the carrier, under such circumstances, cannot be acquired by service of a summons on the traffic agent or by attachment of indebtedness owing to the carrier, by garnishment.

Denver & Rio Grande Western R. R. Co. v. Terte, Adv. Op. 226; Sup. Ct. Rep. Vol. 52, p. 152.

In this opinion the Court considered and reversed a judgment of the Supreme Court of Missouri which denied to the petitioners, railroad companies, their petition for a writ of prohibition to restrain a state court trial judge from entertaining an action against them. The action had been brought in a state court by one Curtis, a railroad employee, under the Federal Employers' Liability Act to recover damages for an injury sustained near Pueblo, Colorado, resulting, as was alleged, from the joint negligence of the Denver and Rio Grande Western Railroad Company, referred to as the Rio Grande, and The Atchison, Topeka & Santa Fe Railway Company, referred to as the Santa Fe. The alleged injury occurred while Curtis was employed at an interlocking track and signal plant near Pueblo.

A writ of attachment against the Rio Grande was served by garnishee process against companies indebted to it, and summonses for both defendants were served on their agents. The defendants appeared specially and moved to quash the attachment and summonses.

Both sides filed affidavits from which it appeared that defense of the action would require attendance of witnesses from Colorado at large expense, and also attendances of witnesses from Missouri. The trial court denied the motions, and the railroad companies brought the petition under review. In this petition they alleged that trial of the cause in Missouri would result in undue burden on interstate commerce, and in violation of the commerce clause and the Fourteenth Amendment.

Reviewing the case on certiorari the Supreme Court, in an opinion by MR. JUSTICE MCREYNOLDS, held that the suit was not properly brought against the Rio Grande in Missouri. The reasons for this view were stated in the opinion as follows:

> The Rio Grande, a Delaware corporation, operates lines which lie wholly within Colorado, Utah and New Mexico. It neither owns nor operates any line in Missouri; but it does own and use some property located there. It maintains one or more offices in the State and employs agents who solicit traffic. These agents engage in transactions incident to the procurement, delivery and record of such traffic. It is not licensed to do business in Missouri.
>
> The Santa Fe, a Kansas corporation, owns and operates railroad lines in Missouri, Kansas, Colorado, and other States. It is licensed to do business in Missouri and has an office and agents in Jackson County. These agents transact the business ordinarily connected with the operation of a carrier by railroad.
>
> After being injured at Pueblo, and before instituting his action against the railroad companies, Curtis removed to and became a bona fide resident and citizen of Missouri.
>
> According to the doctrine approved in *Hoffman v. Foraker*, 274 U. S. 21, we think the Santa Fe was properly sued in Jackson County. The Supreme Court committed no error of which we can take notice by refusing to prohibit further prosecution of the action against that company. The mere fact that the Santa Fe was named a codefendant with the Rio Grande was not enough to defeat jurisdiction of the court over the former.
>
> Under the rule approved in *Michigan Central R. R. Co. v. Mix*, 278 U. S. 492, the Rio Grande properly claimed exemption from suit in Jackson County. It was not necessary to join the two Railroad Companies in one action. Whatever liability exists is several. The prohibition against burdening interstate commerce cannot be avoided by the simple device of a joint action. Nor can this be evaded merely by attaching the property of the non-resident railroad corporation. Obviously, the burden and expense which the carrier must incur in order to make defense in a State where the accident did not occur has no relation to the nature of the process used to bring it before the court.
>
> The alleged residence in Missouri of persons whose testimony plaintiff supposed would be necessary to prove his claim was not enough to justify retention of jurisdiction by the Circuit Court. While this circumstance might enable plaintiff to try his cause there with less inconvenience than elsewhere, it would not prevent imposition of a serious burden upon interstate commerce. And, we have held, it is the infliction of this burden that deprives the courts of jurisdiction over cases like this. . . . Further, as a practical matter, courts could not undertake to ascertain in advance of trial the number and importance of probable witnesses within and without the State and retain or refuse jurisdiction according to the relative inconvenience of the parties.
>
> The judgment of the Supreme Court must be reversed. The cause will be remanded there for further proceedings not inconsistent with this opinion.

The case was argued by Mr .Thomas Hackney for the petitioners and by Mr. Clay C. Rogers for the respondent.

Taxation—State Inheritance Taxes—Situs of Certificates of Stock

Consistently with the requirements of the due process clause of the Fourteenth Amendment, a state may not impose an inheritance tax upon the transfer of property having a situs outside of its jurisdiction. Shares of stock in a foreign corporation have a situs for taxation in the state of the owner's domicile at the time of death and an inheritance tax upon their transfer, at such time, may be imposed by the state of domicile, and not by the state under whose laws the foreign corporation is incorporated.

First National Bank of Boston v. Maine, Adv. Op. 211; Sup. Ct. Rep. Vol. 52, p. 174.

The opinion of majority of the Court in this case extends to certificates of stock the principle laid down in *Farmers' Loan & Trust Co. v. Minnesota,* 280 U. S. 204, that the Fourteenth Amendment permits the imposition of taxes on the transfer, by death, of intangible property only by the state in which the owner was domiciled at the time of death.

In the *Farmers' Loan Company* case, which expressly overruled *Blackstone v. Miller,* 188 U. S. 189, the Court ruled that the transfer of negotiable bonds, some of which were registered, and certificates of indebtedness issued by the State of Minnesota and two of her municipalities, was not taxable by Minnesota, upon the death of the owner who died domiciled in New York.

In this case the State of Maine imposed an inheritance tax on the transfer of shares of stock in a Maine corporation, upon the death of the owner who died testate, domiciled in Massachusetts. The testator's will was probated in Massachusetts which imposed an inheritance tax of $32,000 on the transfer of the stock. Ancillary proceedings were then had in Maine, where the inheritance tax on the transfer of the stock amounted to $62,000. The Supreme Judicial Court of Maine held that the latter tax did not infringe the Fourteenth Amendment. On appeal to the Supreme Court this was reversed by a divided Court. The opinion of the majority was delivered by MR. JUSTICE SUTHERLAND.

In stating the reasons for the decision MR. JUSTICE SUTHERLAND conceded that as recently as the decision in *Frick v. Pennsylvania,* 268 U. S. 473. the doctrine of *Blackstone v. Miller,* had been approved.

In the *Frick* case the Court ruled that the transfer of tangible personal property having an actual situs in a state other than that of the owner's domicile was not taxable by the state of domicile. The effect of that case was summarized as follows:

> It was by the *Frick* case, however, that the rule became definitely fixed that, as to tangible personal property, the power to tax is exclusively in the state where the property has an actual *situs;* and this, as will be seen later, has an important bearing on the present case. Mr. Frick, domiciled in Pennsylvania, died testate owning tangible personal property having an actual *situs* in New York and Massachusetts. His will was probated in Pennsylvania, and a transfer tax was imposed under a Pennsylvania statute which provided for such a tax on all property of a resident decedent, whether within or without the state. Ancillary letters were granted in New York and Massachusetts. We decided, pp. 488-492, that the Pennsylvania tax, in so far as it was imposed upon the transfer of tangible personalty, having an actual situs in other states, was in contravention of the due process clause of the Fourteenth Amendment. Upon a review of former decisions, it was held (1) that the exaction of a tax beyond the power of the state to impose was a taking of property in violation of the due process clause; (2) that while the tax laws of a state may reach every object which is under its jurisdiction, they cannot be given extra territorial operation; and (3) that as respects tangible personal property having an actual situs in a particular state, the power to subject it

to state taxation rests exclusively in that state, regardless of the owner's domicile.

While the Frick case recognized the validity of a tax such as that challenged here, it did, nevertheless, condemn the imposition of a tax on tangible personalty by two states—the state of domicile and the state of situs, where the *situs* of the property and the domicile of the owner were in different states. The objections to double taxation which there led to the ruling regarding tangible personalty are now held to prevent multiple taxation of intangibles, under the proper application of the principle developed in *Farmers Loan & Trust Co. v. Minnesota,* supra.

> The decision of this court in the *Farmers Loan Company* case was foreshadowed by its decision in *Safe Deposit & T. Co. v. Virginia,* 280 U. S. 83. There it was held that intangibles, such as stocks and bonds, in the hands of the legal holder of the title in the state of his residence, may not be taxed at the domicile of the equitable owner in another state; and in respect of taxation of the same securities by two states we said (p. 94):
>
> "It would be unfortunate, perhaps amazing, if a legal fiction originally invented to prevent personalty from escaping just taxation, should compel us to accept the irrational view that the same securities were within two States at the same instant and because of this to uphold a double and oppressive assessment."
>
> A little later at the same term, the *Farmers Loan Company* case was decided. 280 U. S. 204. The facts are recited at page 208. Henry R. Taylor, domiciled in New York, died testate leaving negotiable bonds and certificates of indebtedness issued by the State of Minnesota and two of her municipalities. Some of them were registered; none were connected with businesss carried on by or for the decedent in Minnesota. His will was probated and his estate administered in New York, and a tax exacted by that state on the testamentary transfer. Minnesota assessed an inheritance tax upon the same transfer, which was upheld by her supreme court. This court, applying the maximum *mobilia sequuntur personam,* held that the *situs* for taxation was in New York, and that the tax was there properly imposed. The contention on behalf of the state was that the obligations were debts of Minnesota and her municipal corporations, subject to her control; that her laws gave them validity, protected them and provided means for enforcing payment; and that, accordingly, they had a *situs* for taxation also in that state. . . .
>
> After saying that choses in action, no less than tangible personalty, demand protection against multiple taxation, the court, at p. 212, concluded:
>
> "Taxation is an intensely practical matter and laws in respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences. We have determined that in general intangibles may be properly taxed at the domicile of their owner and we can find no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles. The difference between the two things, although obvious enough, seems insufficient to justify the harsh and oppressive discrimination against intangibles contended for on behalf of Minnesota."
>
> Notwithstanding the registration of certain of the bonds, and notwithstanding the contention that Minnesota protects the debt, compels its payment, and permits its transfer, we concluded that the testamentary transfer was properly taxable in New York, but not also in Minnesota.

Since the doctrine of immunity from taxation in more than one state has been established as to real estate, tangible personalty, and certain intangibles, it was concluded that there was no sufficient basis for making a distinction in respect of shares of stock.

> The rule of immunity from taxation by more than one state, deducible from the decisions in respect of these various and distinct kinds of property, is broader than the applications thus far made of it. In its application to death taxes, the rule rests for its justification upon the fundamental conception that the transmission from the dead to the living of a particular thing, whether corporeal or incorporeal, is an event which cannot take place in two or more states at one and the same time. In respect of tangible property, the opposite view must be rejected as connoting a physical impossibility; in the case of intangible property, it must be rejected as involving an inherent and logical self contradiction. Due regard for the processes of correct thinking compels the conclusion that a determination fixing the local *situs* of a thing for a purpose of transferring it in one state carries with it an implicit denial that there is a local *situs* in another state for the purpose of transferring the same thing there. The contrary conclusion as to intangible property has led to nothing but confusion and injustice by bringing about the anomalous and grossly unfair result that one kind of personal property cannot, for the purpose of imposing a transfer tax, be within the jurisdiction of more than one state at the same time, while another kind, quite as much within the protecting reach of the Fourteenth Amendment, may be, at the same moment, within the taxable jurisdiction of as many as four states, and by each subjected to a tax upon its transfer by death, an event which takes place, and in the nature of things can take place, in one of the states only.
>
> A transfer from the dead to the living of any specific property is an event single in character and is effected under the laws, and occurs within the limits, of a particular state; and it is unreasonable, and incompatible with a sound construction of the due process of law clause of the Fourteenth Amendment, to hold that jurisdiction to tax that event may be distributed among a number of states.
>
> A distinction between bonds and stocks for the essentially practical purposes of taxation is more fanciful than real. Certainly, for such purposes, the differences are not greater than the differences between tangible and intangible property, or between bonds and credits. When things so dissimilar as bonds and household furniture may not be subjected to contrary rules in respect of the number of states which may tax them, there is a manifest incongruity in declaring that bonds and stocks, possessing, for the most part, the same or like characteristics, may be subjected to contrary rules in that regard.
>
> We conclude that shares of stock, like the other intangibles, constitutionally can be subjected to a death transfer tax by one state only.

While it is implicit in the portion of the opinion above discussed, and in the authorities relied upon, that the state of domicile is the only one which properly may impose a tax on the transfer, this aspect of the problem was also elaborated in the opinion.

> The question remains: In which state, among two or more claiming the power to impose the tax, does the taxable event occur? In the case of tangible personalty, the solution is simple; the transfer, that is, the taxable event, occurs in that state where the property has an actual *situs,* and it is taxable there and not elsewhere. In the case of intangibles, the problem is not so readily solved, since intangibles ordinarily have no actual *situs.* But it must be solved unless gross discrimination between the two classes of property is to be sanctioned; and this court has solved it in respect of the intangibles heretofore dealt with by applying the maxim *mobilia sequuntur personam.* . . .
>
> This ancient maxim had its origin when personal property consisted, in the main, of articles appertaining to the person of the owner, such as gold, silver, jewels and apparel, and, less immediately, animals and products of the farm and shop. Such property was usually under the direct supervision of the owner and was often carried about by him on his journeys. Under these circumstances, the maxim furnished the natural and reasonable rule. In modern times, due to the vast increase in the extent and variety of tangible personal property not immediately connected with the person of the owner, the rule has gradually yielded to the law of the place where the property is kept and used. . . . But in respect of intangible property, the rule is still convenient and useful, if not always necessary; and it has been adhered to as peculiarly applicable to that class of property. . . .
>
> The considerations which justify the application of the fiction embodied in the maxim to death transfer taxes imposed in respect of bonds, certificates of indebtedness, notes, credits and bank deposits, apply, with substantially the same force, in respect of corporate shares of stock. And since death duties rest upon the power of the state, imposing them to control the privilege of succession, the reasons which sanction the selection of the

domiciliary state in the various cases first named, sanction the same selection in the case last named. In each case, there is wanting, on the part of a state other than that of the domicile, any real taxable relationship to the event which is the subject of the tax. Ownership of shares by the stockholders and ownership of the capital by the corporation are not identical. The former is an individual interest giving the stockholder a right to a proportional part of the dividends and the effects of the corporation when dissolved, after payment of its debts. . . . And this interest is an incorporeal property right which attaches to the person of the owner in the state of his domicile. The fact that the property of the corporation is situated in another state affords no ground for the imposition by the state of a death tax upon the transfer of the stock. . . . And we are unable to find in the further fact of incorporation under the laws of such state, adequate reason for a different conclusion.

In conclusion it was noted that the decision here does not condemn the imposition of a tax upon the transfer of a non-resident's certificate and the issuance of a new certificate, where the tax is not a succession tax, but a tax upon the transfer similar to that imposed on transfers inter vivos. It was also pointed out that the decision does not purport to cover cases of transfer by death of shares so employed in business in the state of incorporation as to acquire a situs there.

MR. JUSTICE STONE delivered a dissenting opinion in which MR. JUSTICE HOLMES and MR. JUSTICE BRANDIES concurred. In his opinion MR. JUSTICE STONE said:

Recognizing that responsibility must rest primarily on those who undertake to blaze a new path in the law, to say how far it shall go, and notwithstanding the decisions of this Court in *Safe Deposit & Trust Company v. Virginia*, 280 U. S. 83; *Farmers Loan & Trust Company v. State of Minnesota*, 280 U. S. 204; *Baldwin v. Missouri*, 281 U. S. 586; *Beidler v. South Carolina Tax Commission*, 282 U. S. 1, I am not persuaded that either logic, expediency, or generalizations about the undesirability of double taxation justify our adding to the cases recently overruled, the long list of those which, without a dissenting voice, have supported taxation like the present. No decision of this Court requires that result. . . .

Such want of logic as there may be in taxing the transfer of stock of a non-resident at the home of the corporation results from ascribing a *situs* to the shareholder's intangible interest which, because of their very want of physical characteristics, can have no *situs*, and again in saying that the rights, powers, and privileges incident to stock ownership and transfer which are actually enjoyed in two taxing jurisdictions, have *situs* in one and not in the other. *Situs* of an intangible, for taxing purposes, as the decisions of this Court, including the present one, abundantly demonstrate, is not a dominating reality, but a convenient fiction which may be judicially employed or discarded, according to the result desired.

In further stating his reasons for thinking that the judgment should be affirmed MR. JUSTICE STONE urged that the protection afforded by the laws of Maine constituted sufficient basis for its tax, and that due process clause seemed insufficient to destroy that basis.

The present tax is not double in the sense that it is added to that imposed by Massachusetts, since the Maine statute directs that the latter be deducted from the former. But, as the stockholder could secure complete protection and effect a complete transfer of his interest only by invoking the laws of both states, I am aware of no principle of constitutional interpretation which would enable us to say that taxation by both states, reaching the same economic interest with respect to which he has sought and secured the benefits of the laws of both, is so arbitrary or oppressive as to merit condemnation as a denial of due process of law. Only by recourse to a form of words—saying that there is no taxable subject within the the state, by reason of the fictitious attribution to the intangible interest of the stockholder of a location elsewhere, is it possible to stigmatize the tax as arbitrary. . . .

The present denial to Maine of power to tax transfers of shares of a non-resident stockholder in its own corporation, in the face of the now accepted doctrine that a transfer of his chattels located there and equally under its control, *Frick v. Pennsylvania* . . ., and that his rights as *cestui que trust* in a trust of property within the state, *Safe Deposit & Trust Company v. Virginia* . . ., may be taxed there and not elsewhere, makes no such harmonious addition to a logical pattern of state taxing power as would warrant overturning an established system of taxation. The capital objection to it is that the due process clause is made the basis for withholding from a state the power to tax interests subject to its control and benefited by its laws; such control and benefit are together the ultimate and indubitable justification of all taxation.

I think the judgment should be affirmed.

The case was argued by Mr. Leonard A. Pierce for the appellant, and by Mr. Clement F. Robinson for the appellee.

Taxation—Federal Income Taxes on Estates

Although actions for the recovery of additional income taxes without assessment within five years after the filing of the return are barred, under Section 277 (a) of the Revenue Act of 1926, such additional taxes due may be set up as a bar to an action by the taxpayer to recover an alleged overpayment, and for setting up such defense the tax may be redetermined and reassessed, after expiration of the five year period following the filing of the return.

Lewis, et al. v. Reynolds, Adv. Op. 224; Sup. Ct. Rep. Vol. 52, p. 145.

The question involved in this opinion arose out of a suit to recover a refund of taxes which the petitioners contended were wrongfully exacted from the estate of one Cooper. A return of the estate's income from January 1st to December 12th, 1920, was filed February 18th, 1921. The return showed deduction of $20,750 for attorneys' fees and $16,870 for inheritance taxes paid to the State. The tax computed on the basis of the return was paid.

On November 24th, 1925, the Commissioner, after audit of the return, disallowed all deductions except that for attorney's fees and assessed a deficiency of $7,297.16. This was paid March 21st, 1926, and on July 27th, 1926, the petitioners asked for its refund.

In May, 1929, the Commissioner advised that the deduction for attorney's fees had been improperly allowed, and sent a revised computation deducting state inheritance taxes. The revised computation showed greater liability than the total of sums paid by the state, and the Commissioner rejected the claim for refund, stating that the unpaid balance of the amount of tax, correctly computed, was barred by the statute of limitations.

The petitioners contended that, since the statute barred assessment for the additional tax the Commissioner lacked authority to redetermine and reassess the tax after the statute had run, and that at the time of his last decision he was restricted to consideration of the demand for refund, and determination of the claimed deduction of state inheritance taxes.

The Court, however, sustained the action of the Commissioner and affirmed a judgment denying the claim for refund, in an opinion by MR. JUSTICE MCREYNOLDS.

After referring to Sec. 284, Revenue Act of 1926, 44 Stat. 66, and Sec. 322, Revenue Act of 1928, 45 Stat. 861, the Circuit Court of Appeals said—(by Mr. Justice Phillips):

"The above quoted provisions clearly limit refunds to overpayments. It follows that the ultimate question presented for decision, upon a claim for refund, is whether the taxpayer has overpaid his tax. This involves a redetermination of the entire tax liability. While no new

assessment can be made, after the bar of the statute has fallen, the taxpayer, nevertheless, is not entitled to a refund unless he has overpaid his tax. The action to recover on a claim for refund is in the nature of an action for money had and received, and it is incumbent upon the claimant to show that the United States has money which belongs to him."

While the statutes authorizing refunds do not specifically empower the Commissioner to reaudit a return whenever repayment is claimed, authority therefor is necessarily implied. An overpayment must appear before refund is authorized. Although the statute of limitations may have barred the assessment and collection of any additional sum, it does not obliterate the right of the United States to retain payments already received when they do not exceed the amount which might have been properly assessed and demanded.

The case was argued by Mr. N. E. Corthell for the petitioners and by Assistant Attorney General Youngquist for the respondent.

Workmen's Compensation Act — Application to Railway Employees

An employee of a railroad company, which engages in both intrastate and interstate commerce, is entitled to the benefit of the provisions of the state workmen's compensation act for an injury sustained in the course of his employment, unless, at the time of the injury he is engaged in interstate transportation or in work so closely related to it as to be practically a part of it.

An employee injured while engaged in the operation of a motor supplying power for hoisting coal into a chute, although the coal is to be used as fuel for locomotives hauling interstate freight, is not engaged in interstate transportation, and his remedy for such injury is under the state workmen's compensation act.

Chicago & Eastern Illinois R. R. Co. v. Industrial Commission of Illinois, Ad. Op. 204; Sup. Ct. Rep. Vol. 52, p. 151.

In this opinion the Court considered the question whether, under the circumstances surrounding the injury, a railroad employee was subject to the state workmen's compensation act, or whether he was so engaged in interstate commerce as to be within the Federal Employers' Liability Act.

The railroad engages in both interstate and intrastate commerce. At the time of his injury the employee, Thomas, was engaged in running an electric motor to supply power for hoisting coal into a chute. The coal so placed was used principally for locomotives employed in moving interstate freight. While engaged in running the motor Thomas' hand was caught in the gears and injured. The Industrial Commission of Illinois, to which Thomas applied for an award under the State Compensation Act, made an award of $2,184.64, which the Circuit Court of Cook County affirmed. The State Supreme Court, in its discretion, declined to review the judgment.

On certiorari granted to the circuit court the judgment was affirmed by the Supreme Court of the United States, whose opinion was delivered by MR. JUSTICE SUTHERLAND. He pointed out, as has been recently stated in *Chicago & North Western Ry. Co. v. Bolls,* that to be with the Federal Employers' Liability Act the employee must be engaged in interstate *transportation,* or work so closely related to it as to be practically a part of it, and that the *Collins* and *Szary* cases, *infra,* construing the statute otherwise, do not constitute a correct exposition of the law, and are overruled.

> The contention that Thomas was employed in interstate commerce at the time of the injury, rests upon the decisions of this court in *Erie R. R. Co. v. Collins,* 253 U. S. 77, and *Erie R. R. Co. v. Szary,* 253 U. S. 86. In the *Collins* case the employee, at the time of his injury, was operating a gasoline engine to pump water into a tank for the use of locomotives engaged in both interstate and intrastate commerce. In the *Szary* case the duty of the employee was to dry sand by the application of heat for the use of locomotives operating in both kinds of commerce; and he was so employed when injured. In each case this court held that the employee was engaged in interstate commerce at the time of the injury, within the terms of the Federal Employers' Liability Act.
>
> The only difference between those cases and this one is that here the work of the employee related to coal, while in the *Collins* case it related to water, and in the *Szary* case, to sand. Obviously, the difference is not one of substance and if the *Collins* and *Szary* cases are followed an affirmance of the judgment below would result.
>
> But in *Chi., Burlington & Q. R. R. v. Harrington,* 241 U. S. 177, the injured employee was engaged in taking coal from storage tracks to bins or chutes for the use of locomotives used in the movement of both interstate and intrastate traffic; and this court held that the service was not in interstate commerce. After quoting the test for determining whether an employee is engaged in interstate commerce, laid down in *Shanks v. Del., Lack., & Western R. R.,* 239 U. S. 556, 558, namely, "was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it," this court said (p. 180), "Manifestly, there was no such close or direct relation to interstate transportation in the taking of the coal to the coal chutes. This was nothing more than the putting of the coal supply in a convenient place from which it could be taken as required for use."
>
> We are unable to reconcile this decision with the rule deducible from the *Collins* and *Szary* cases, and it becomes our duty to determine which is authoritative. From a reading of the opinion in the *Collins* case, it is apparent that the test of the *Shanks* case was not followed (see p. 85), the words, "interstate commerce" being inadvertently substituted for the words "interstate transportation." The *Szary* case is subject to the same criticism, since it simply followed the *Collins* case. Both cases are out of harmony with the general current of the decisions of this Court since the *Shanks* case, *Chicago & North Western Ry. Co. v. Bolle.*—U. S.—, decided November 23, 1931, and they are now definitely overruled. The *Harrington* case furnishes the correct rule, and, applying it, the judgment below must be *Affirmed.*

A problem similar to that considered in the foregoing opinion was considered a short time later in *New York, New Haven & Hartford R. R. Co. v. Bezue,* Adv. Op. 258; Sup. Ct. Rep. Vol. 52, p. —, in which the opinion was delivered by MR. JUSTICE ROBERTS. There the employee was injured while engaged in repair work on a locomotive which had been rendered incapable of locomotion by the removal of the main driving wheels. On the ninth day of the period during which the repairs were going on the injury in question occurred. It appeared that the employee customarily engaged in minor repairs to locomotives engaged in interstate commerce.

In a suit brought in a state court of New York for recovery of damages under the Federal Employers' Liability Act the employee recovered judgment, which the Court of Appeals of New York affirmed. That court concluded that the fact that the plant at which the respondent worked was necessary to the operation of the road and to the conduct of interstate commerce warranted characterization of all of his work, of whatever nature, as in interstate commerce. Holding that the test applied was too broad, MR. JUSTICE ROBERTS said:

> The test thus applied is broader than our decisions justify. All work performed in railroad employment may, in a sense, be said to be necessary to the operation of the road. The business could not be conducted without repair shop employees, clerks, janitors, mechanics, and those who operate all manner of appliances not directly or in-

timately concerned with interstate transportation as such, or with facilities actually used therein. But we have held that the mere fact of employment does not bring such employees within the Act. . . .

The criterion of applicability of the statute is the employee's occupation at the time of his injury in interstate transportation or work so closely related thereto as to be practically a part of it. . . . Under the circumstances of this case, whether respondent is within the Ast must be decided not by reference to the kind of plant in which he worked, or the character of labor he usually performed, but by determining whether the locomotive in question was, at the time of the accident, in use in interstate transportation or had been taken out of it. The length of the period during which the locomotive was withdrawn from service and the extent of the repairs bring the case within the principle announced in *Industrial Accident Commn. v. Davis*, and *Minneapolis & St. Louis R. Co. v. Winters*, 242 U. S. 353, stamp the engine as no longer an instrumentality of or intimately connected with interstate activity, and distinguish such cases as *New York Cent. R. Co. v. Marcone*, 281 U. S. 345, where the injured employee was oiling a locomotive which had shortly before entered the roundhouse after completing an interstate run.

The Thomas case was argued by Mr. Edward W. Rawlins for the petitioner and by Mr. Samuel E. Hirsch for the respondent; the Bezue case was argued by Mr. Edward Brumley, for the petitioner and by Mr. Thomas J. O'Neill for the respondent.

Taxation—Discriminatory State Taxes on State and National Banks—Equal Protection

State taxes imposed on stock of state and national banks at a higher rate than taxes imposed generally on the stock of competing state corporations and moneyed capital, are discriminatory, violate the equal protection clause and violate also the right of national banks under Sec. 5219 of the Revised Statutes of the United States forbidding discriminatory taxation of national banks.

Discrimination in taxation, resulting from the imposition of a tax at the lawful rate on one taxpayer simultaneously with the imposition of a tax at a rate lower than the lawful rate on others similarly situated, where the higher tax is extended by a state officer and enforced by the state courts, constitutes a denial of equal protection by the state to taxpayers paying at the higher rate, even though the discrimination results from the unauthorized action of an individual state officer acting contrary to state law.

Iowa-Des Moines National Bank vs. Bennett, et al. Adv. Op. 164; Sup. Ct. Rep. Vol. 52, p. 133.

This opinion, by MR. JUSTICE BRANDEIS, disposed of two cases involving petitions for mandamus, brought by two banks to compel a refund of taxes alleged to have been illegally exacted of them in contravention of state law and of the equal protection clause of the Fourteenth Amendment. One of the banks is an Iowa State bank, and one a national bank. After protracted hearings the state trial court denied relief without opinion or findings of facts. The state supreme court affirmed the judgment by a divided bench. On certiorari this was reversed by the Supreme Court of the United States.

In stating the question involved MR. JUSTICE BRANDEIS said:

> The case is before us on an extensive record; but we have no occasion to examine the controverted issues of fact and of state law. The Supreme Court found, or assumed, that the systematic discrimination charged was in fact made; that the shares of the favored domestic corporations constituted a relatively material part of other moneyed capital employed in substantial competition with the business of the banks; and that the unequal exaction complained of violated the laws of Iowa. We have to consider only the legal effect under the federal law of this wrongful administration of the state law. There is no challenge of the validity of any state statute.

The taxes exacted were imposed under §1322—1a, Supplement 1913, of the Iowa Code imposing an *ad valorem* tax on all state and national bank stock, and loan and trust company stock and moneyed capital, based on 20% of the actual value. This tax, for the period involved, amounted to 137.8 to 164 mills, or 27.5 to 32.8 mills on the actual value. Under the same provision taxes on the same basis should have been laid on shares of competing domestic corporations and moneyed capital. But on the shares of competing domestic corporations a tax was levied at the rate of only 5 mills on the actual value, amounting to taxes at the rate of but 1/5 to 1/7 of that applied to the shares of the petitioners.

The method by which this result was reached is described as follows in the opinion:

> The wrongful discrimination so effected was not attributable to any act of the assessing body. The shares in such competing domestic corporations had, in each year, been properly classified by the assessor in compliance with § 1322-1a; but the county auditor, in making up the tax list subsequently, changed these assessments and wrongfully extended them upon the books as "moneys and credits" subject to the 5 mill levy. In this form the tax was certified by the auditor to the county treasurer for collection; and the treasurer exacted taxes in accordance with the auditor's certification.
>
> The Supreme Court of Iowa, having found or assumed that there was systematic discrimination, as charged, in favor of shares in the competing domestic corporations, denied relief because it held that the auditor's acts in disregarding assessments properly made were a usurpation of power and a nullity; that the county treasurer was not bound to accept the auditor's unauthorized certification; and that his exaction of the taxes in accordance therewith was, therefore, also unauthorized. The Court declared that, since the wrongful exaction was made without authority from the State, it did not constitute discrimination by the State; declared that, since neither the auditor nor the treasurer had power to discharge a legally assessed tax, the competing domestic corporations remain, so far as appears, liable for the balance of the assessments; and held that the petitioners had no other remedy than to await action by the taxing authorities to collect the taxes remaining due from their competitors or to initiate proceedings themselves to compel such collection. In other words, it held that no right of petitioners under the state law was violated, because they were not overassessed; that no right under the federal law was violated, because the lower taxation of their competitors due to usurpation by officials was not an act of the State; and that the discrimination thus affected was remediable only by correcting the wrong under the state law in favor of the competitors and not "by extending . . . the benefits as of a similar wrong" to the petitioners. The decision rests upon a misconception of the scope and effect of the federal rights involved.

The contention of the national bank that the imposition of the tax violates §5219 of the Revised Statutes of the United States was first considered in deciding the legal questions presented. That section permits a state to tax national banks only so far as the taxation is not at a greater rate than that assessed on other moneyed capital of an individual citizen of the state.

> The limits of this permission were transgressed when the treasurer exacted from this petitioner taxes at rates greater than those applied in exacting payment from the competing domestic corporations. . . . The discrimination was none the less action by the State although the auditor and the treasurer, in failing to give equal treatment, acted without authority and contrary to the law of the State. "It is a question of the power of the State as a whole;" and for the purpose of determining whether the limitations imposed by § 5219 have been observed, the powers of the several state officials must be treated as if merged in a single officer. The condition imposed by the federal law was

not satisfied by the enactment by the State of appropriate legislation for the taxation of other moneyed capital, and the commitment to subordinate officers of the duty of determining what constitutes such capital. The responsibility of the State for the propriety of that determination remained. Moreover, since the state now insists upon retaining the higher tax exacted from the national bank, and is sustained in so doing by its highest court, the discriminatory action cannot be said to be the act of the individual officials.

Both petitioners contended that they had been subjected to intentional, systematic discrimination, in disregard of the equal protection clause. Sustaining this contention the Court said:

But the Iowa court, without denying the lack of power of the State to authorize the discrimination effected, holds that such discrimination does not violate the federal Constitution because it resulted from the act of private individuals and not of the State. The prohibition of the Fourteenth Amendment, it is true, has reference exclusively to action by the State, as distinguished from action by private individuals. . . But acts done "by virtue of public position under a State Government . . . and in the name and for the State", . . are not to be treated as if they were the acts of private individuals, although in doing them the official acted contrary to an express command of the state law. When a state official, acting under color of state authority, invades, in the course of his duties, a private right secured by the federal Constitution, that right is violated, even if the state officer not only exceeded his authority but disregarded special commands of the state law. Here, the exaction complained of was made by the treasurer in the name of and for the State, in the course of performing his regular duties; the money is retained by the State; and the judicial power of the State has been exerted in justifying the retention.

In conclusion, the Court observed that there was inadequate relief afforded to the petitioners in the suggestion that the state may still have power to equalize the treatment accorded the petitioners and competing domestic corporations by compelling the latter to pay unpaid balances of assessments against them for the years in question.

The petitioners' rights were violated, and the causes of action arose, when taxes at the lower rate were collected from their competitors. It may be assumed that all ground for a claim for refund would have fallen if the State, promptly upon discovery of the discrimination, had removed it by collecting the additional taxes from the favored competitors. By such collection, the petitioners' grievances would have been redressed; for these are not primarily overassessments. The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced. But it is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid.

The case was argued by Messrs. John G. Gamble and A. B. Howland for the petitioners, and by Messrs. Charles Hutchinson and Eskil C. Carlson for the respondents.

THE AMERICAN-MEXICAN CLAIMS ARBITRATION

International Arbitration Faced a Test of Practicability in Efforts of United States and Mexico to Settle the Large Number of Claims Originating between 1868 and 1927 before International Commissions—Brief Consideration of Results

By John J. McDonald and Carlyle R. Barnett*

INTERNATIONAL arbitration has faced a test of practicability in the effort of the United States and Mexico to settle before International Commissions the large number of claims of their respective nationals which had their origin between 1868 and 1927. From the record of cases decided during a period of seven years by the Commissions established under the Conventions of September 8 and 10, 1923, between these Governments, and commonly known as the General and Special Claims Commissions, it might reasonably be concluded that the work of those Commissions has hardly begun; and yet the lives of those Commissions have expired, and the machinery as previously assembled by the United States for the active conduct of this arbitration was dismantled on October 15, 1931. However, in the First Deficiency Bill of February 3, 1932, there was made available the amount of $50,000, the primary purpose of which apparently was to make provision for the closing up of the affairs of the American Agency. It seems, therefore, to be an opportune time to consider briefly the results of this arbitration, the future of which is uncertain, from the points of view not only of its accomplishment in the settlement of claims, but also of its contribution to the body of international law.

The background and terms of the Conventions were considered in an address before the American Bar Association at Detroit on September 2, 1925, by the Honorable Charles Beecher Warren who, with the Honorable John Barton Payne, represented the United States during the negotiations, at the so-called Bucareli Conferences of 1923, preceding the adoption of the Conventions.[1] Following decisions by the General Claims Commission in several claims, a discussion of certain principles of international law as applied by that Commission appeared in this Journal in 1928.[2]

The General Claims Convention of September 8, 1923, comprehended, with one exception, all claims of citizens of both countries which had arisen since July 4, 1868[3], and which might arise within three years

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1. Vol. XI (Sept., 1925), p. 586; see also, Dr. J. B. Scott in Am. Jour. Int. Law (1924), Vol. 18, p. 315.
2. Joseph Conrad Fehr, International Law as applied by U. S.-Mexico Claims Commission, Vol. XIV (June, 1928), p. 312.
3. Claims Convention of July 4, 1868, Malloy, *Treaties, Conventions, etc.*, Vol. I, p. 1128.

from the date of the first meeting of the General Claims Commission. This latter date became August 30, 1927. The excepted claims were those of American citizens which arose during the revolutionary period in Mexico from 1910 to 1920 and which were due to acts of certain specifically designated forces. These claims, reserved from the jurisdiction of the General Claims Commission, were entrusted for decision under the Special Claims Convention of September 10, 1923, to the Special Claims Commission. It is to be particularly observed that other claims of the excepted period, which were not within the limited jurisdiction of the Special Claims Commission, were to be heard by the General Claims Commission. Mexico assumed responsibility *ex gratia* for the claims within the purview of the Special Claims Commission, whereas as regards the claims to be decided by the General Claims Commission, the accepted rules and principles of international law were to be applied. The existence of two Commissions, each operating under its own Convention, does not to any great extent complicate the consideration of this arbitration, as the activity of the Special Claims Commission was confined to two brief periods—at the beginning and at the end of its life.

When the Commissions assumed their duties in 1924, almost sixty years had elapsed since the last general arbitration with Mexico, and claims had arisen on both sides of the Rio Grande. They were confronted, therefore, with the task of deciding an uncertain number of claims within a period of a few years: the General Claims Commission within three years from the date of its first meeting; the Special Claims Commission within five years. Furthermore, the General Claims Convention required that the filing of all claims, except those which might arise after September 8, 1923, be accomplished within one year from the first meeting of its Commission, and as regards the Special Claims Commission the period of two years was fixed. The impossibility of the Governments preparing formal pleadings in all claims within those periods was at once recognized; and, therefore, resort was made by both Commissions to the procedure of considering a formal filing of a claim as made on the submission by either Government of a Memorandum setting forth the name and address of the claimant and the amount of and a brief statement of the facts of the claim. Under this procedure there were docketed some 4900 separate American claims of an amount of approximately $686,000,000.00 and some 836 Mexican claims of an amount of approximately 245,000,000 pesos. It may be observed, however, that the preparation of formal pleadings and briefs was carried on continuously by the American and Mexican Agencies after 1924 with the result that several hundred claims in all stages of development are now reposing in the files of the Joint Secretaries of the Commissions. It was not until the second year of either Commission's existence that the decision of claims was undertaken.

The claims initially filed with the General Claims Commission cover a wide field. The earliest claims in point of time were those which were based upon the losses of cattle in Texas during the early seventies of the last century at the hands of raiders from Mexico. As showing the varied character, claims involved bonds, collection of illegal taxes, Comisión Reguladora del Mercado de Henequen, concessions, contracts, currency, detention of ships and cargoes, expulsion, loans, loss of bank deposits, maltreatment in prison, mining rights, murders, postal money orders, rights in land and subsoil and unlawful arrests. A large number of the Mexican claims were based on the complaint of Mexico that the United States had failed to carry out the provisions of the Treaty of Guadalupe Hidalgo of 1848[4] in the protection of titles of property of Mexican citizens in Texas. Among other Mexican claims were those growing out of the occupation of Vera Cruz by American troops in 1914 and the Pershing Expedition in 1916. As may be anticipated, the claims filed with the Special Claims Commission account for approximately one-half of the American claims; for, as found by the Committee on Foreign Relations of the United States Senate in its investigation of Mexican affairs in 1920, 785 American citizens had been killed or wounded and property in the amount of approximately half a billion dollars had been lost or destroyed during the period of revolutions in Mexico.[5]

The Special Claims Commission held only two sessions at which claims were heard and decided on their merits: At the first, a decision was rendered on April 26, 1926, involving the murders of seventeen American citizens by Villa adherents at Santa Isabel, Mexico on January 10, 1916; at the second, the Commission decided on April 24, 1931, a claim growing out of the murder of Hubert L. Russell in Mexico by Orozquistas on September 29, 1912. Both claims were disallowed, the American Commissioner in each instance dissenting.[6] As has been seen, Mexico assumed liability under the Special Claims Convention for the acts of a force only in the event that the force had a status specifically described in the Convention. Therefore, the opinion of the Commission in each case was primarily concerned with the determination of the status of the force which caused the loss or damage.

The commissioners who heard the *Santa Isabel* claims in 1926 were Dr. Rodrigo Octavio of Brazil, Presiding Commissioner; Honorable Ernest B. Perry, American Commissioner, and Dr. Fernando Gonzales Roa, Mexican Commissioner. Neither Dr. Octavio nor Mr. Perry again sat as Commissioners. Dr. Octavio resigned on July 9, 1926, and as his successor, Dr. Kristian Sindballe of Denmark, was not appointed until June 16, 1928, for that period of nearly two years this Commission was without a Presiding Commissioner. Dr. Sindballe resigned on July 1, 1929, without having attended a session of the Commission, and his place was taken by Dr. Horacio F. Alfaro, recently designated Panamanian Minister to the United States, who was appointed on May 27, 1930, and presided at the session at which the *Russell* claim was heard. Following the resignation of Mr. Perry from the Special Claims Commission on November 30, 1930, the Honorable Fred K. Nielsen, who was then serving as American Commissioner on the General Claims Commission, was appointed in his place on January 6, 1931. It is to be observed that beginning with the appointment of Dr. Sindballe in 1928, the two Commissions were virtually merged, in that, while Drs. Sindballe and Alfaro were Presiding Commissioners, each acted in that capacity upon both the General Claims Commission and the Special Claims Commission.

The results of the Special Claims Commission were, through inactivity, negligible. The General Claims Commission, on the other hand, held several

4. *Ibid.*, p. 1107.
5. Senate Document, No. 285, 66th Congr., 2nd Sess., pp. 3382-3399.
6. Printed decisions of this Commission have not yet been made available.

sessions in Washington and Mexico City, and rendered decisions in 148 claims, nine of these being Mexican claims. A question may arise as to the binding force of two of the decisions, since they were not rendered conformably with the Rules of that Commission. The total amount of awards, exclusive of interest, to American citizens in 89 cases was $2,599,166.10; the Mexican awards amounting in five cases to $39,000.00. The remaining 54 claims were disallowed. In connection with the amount awarded American claimants, it is observed that one award was in the amount of $1,807,531.36, while another was for $140,000.[7]

The Commissioners who first sat for the hearing of claims of the General Claims Commission were Dr. C. van Vollenhoven of the Netherlands, Presiding Commissioner; the late Edwin B. Parker, American Commissioner, and Lic. G. Fernandez MacGregor, Mexican Commissioner. On the resignation of Judge Parker, Dr. Nielsen, on July 31, 1926, was appointed American Commissioner. Following the resignation on August 31, 1927 of Dr. van Vollenhoven, his successor, Dr. Kristian Sindballe, was not appointed until June 16, 1928. On his resignation on July 1, 1929, a lapse of nearly a year preceded Dr. Alfaro's appointment on May 27, 1930, as Presiding Commissioner.

In 1927, and again in 1929, the term originally assigned in the General Claims Convention of 1923, for the completion of the work of its Commission was extended for periods of two years. In like manner, the term assigned to the Special Claims Commission under its Convention was extended in 1929 for an additional two years, although no session had then been held since that of 1926 when a decision was rendered in the *Santa Isabel* claims. In August, 1931, the lives of both Commissions came to an end without the Governments of the United States and Mexico having come to an agreement as to further extensions.

In a cursory consideration of the causes of the failure of the Commissions to hear and decide a greater number of claims, certain factors are obvious. Inaction for periods of twenty-one months in the case of the General Claims Commission and of thirty-three months in the case of the Special Claims Commission due to the lack of Presiding Commissioners, is clearly not chargeable to the Commissions. Moreover, after 1928, the Commissions could not hold sessions simultaneously, as Drs. Sindballe and Alfaro were in turn Presiding Commissioners on both Commissions. It is observed, however, that the General Claims Commission, while it had a Presiding Commissioner, did not hold meetings continuously, some of the delay being occasioned because sessions were held both in Washington and in Mexico City. An additional factor of importance which bears on the matter of expedition, is the procedure under which the arbitration was conducted.

The documentary record of a fully-pleaded and briefed claim consists of Memorial, Answer, Reply, Brief, Reply-brief and Counter-brief. Since practically every claim decided was prepared for submission to either Commission under this procedure, the issues were thus normally given detailed consideration in the written record. However, full oral argument, also, was permitted, under the Conventions the representatives of each Government being authorized "to present to the Commission, orally or in writing, all the arguments deemed expedient in favor of or against any claim."[8] Arguments are often not only desirable but also necessary; but as the argument of a single case before the Commissions, in some instances, lasted for many days, and as, with few exceptions, every claim was vigorously contested, the number of claims which could be decided during a session consequently was limited. If compromises are not possible, and time for full arguments is not available, each so-called National Commissioner, being cognizant of the interests of his Government, may be relied upon, as shown by the dissenting opinions, to call for argument upon any point which he might desire to have developed further than is set forth in the written record.[9]

In connection generally with the procedure obtaining before arbitral commissions, it is interesting to note the statement of Dr. Nielsen in his searching address before the Federal Bar Association on February 4, 1930, which was printed in the JOURNAL, and in which he said:

> ". . . No progress has been made in the formulation of rules to promote expedition and economy. Little or no use has been made of the fruits of intensive experience in arbitration work. And yet assuredly nothing could be approximately more important in any endeavor for progress and improvement."[10]

From the point of view of the contribution of this arbitration to the body of international law, the 1300 pages of opinions, rendered after arguments had been heard *ad libitum*, will remain as a source from which may be drawn thoroughly studied and carefully reasoned statements on many points in the law of nations. In many of the cases, though there was agreement as to the decisions, separate expressions of views were given. The independence of thought of the Commissioners is further shown by the twenty-one reported dissenting opinions, several of which are characterized by a vigorousness that is stimulating and by analysis and logic that overshadow the majority opinions. A glimpse at the opinions will be interesting.

During the long lapse of time between the arbitrations of 1868 and 1923 death had made inroads and records had been lost or destroyed. The General Claims Commission appreciative of that situation placed upon both Governments in its early sessions the duty of cooperating with it in searching out and presenting to it "all facts throwing any light on the merits of the claim presented"[11], and it particularly pointed out that the rules as to burden of proof pertaining in domestic actions have no place in international procedure. Consideration of the sufficiency of evidence which was solely documentary in character consisting of official records, affidavits, contemporary correspondence, personal as well as diplomatic, and the like, holds a prominent place in the opinions. Due to the differences present in the legal systems of the United States and Mexico, the character of the evidence which should be submitted to sustain a contention presented perplexing questions. Mexico particularly objected to the presentation of affidavits and denied that, since affidavits are *ex parte*, any probative value should be attributed to the statements contained in them. The Special, as well as the General Claims Commission, de-

7. Claims of *Illinois Central Railroad Company* and *H. G. Venable*, Opinions of Commissioners, (U. S. Government Printing Office, Washington), 1927, pp. 187 and 331.

8. Article III of the General Claims Convention and Article IV of the Special Claims Convention.

9. Regarding an arbitration in which arguments were few and compromises common, see articles by Fehr, "Paying Our Claims against Germany, Journal, Vol. XII (June, 1926), p. 408; and "American and German War Claims Settled," *ibid.*, Vol. XVIII (Jan. 1932), p. 896; see, also, comments on the American-German arbitration in article by Howard S. LeRoy, *ibid.*, Vol. XII (March, 1926), p. 156.

10. *Ibid.*, Vol. XVI (April, 1930), p. 229, 231. See, also, an address on the World Court by the Honorable Charles Evans Hughes, *ibid.*, Vol. XVI (March, 1930), p. 151.

11. Claim of *William A. Parker*, Ops. Comm., 1927, p. 39.

clined to adopt the Mexican position, and in compliance with the mandates of their Conventions, they were liberal in receiving evidence. However, to justify an award, both insisted that the evidence produced by the claimant Government be concrete and convincing.

A survey of the claims decided by the General Claims Commission, on submission by the Agencies, discloses that a majority concern maltreatment in prison, murder, personal injury, robbery and unlawful arrest and imprisonment. Denial of justice, therefore, occupies a prominent place in the opinions. Apart from the question presented in several of these claims, as to whether or not international responsibility was direct or indirect—a distinction the soundness of which some eminent authorities doubt—the bases of responsibility most frequently met were lack of diligence on the part of the respondent Government in apprehending wrongdoers or its failure to impose proper penalties upon them. To determine the existence of international responsibility the Commission gave application, in the light of the facts of each case, to the broad test as to whether or not there was convincing evidence of a pronounced degree of improper governmental administration. In the awards made in these claims appears the effect of the decision of a majority of the Commissioners in the claim of *Laura M. B. Janes, et al.*[12] in which the private individual's crime was separated from the Government's delinquency. In the light of that holding, the Commission allowed damages on the basis not of the loss caused by the act of the individual, but of that occasioned through the sense of indignity, grief and humiliation suffered through the failure of the Government to bring the wrongdoer to justice.[13]

Discussion of jurisdictional questions involving citizenship[14] and the extent of the Commission's powers to entertain claims of the revolutionary period appear often in the opinions, but a claim which was considered by a majority of the General Claims Commission to turn on jurisdictional grounds, and to which particular attention was directed by that Commission was that of the *International Fisheries Company*.[15] This claim was predicated upon the wrongful cancellation by Mexico, of a concession containing a so-called Calvo clause, which, in general, may be stated to make an alien a national for a particular purpose, to oblige the alien to have resort only to the national courts in the determination of his rights in connection with a contract, or the like, or to provide for a waiver by the alien of the diplomatic protection of his Government as regards the contract, or the particular purpose. The Presiding and Mexican Commissioners in a decision of July, 1931, in the *Fisheries* claim, reaffirmed an earlier decision of 1925, in the case of *North American Dredging Company of Texas*[16] which related to a contract containing such a clause.[17] In the latter case, the Commission held that the claimant, under its contract, could not rightfully present the claim to its Government, since it had made no attempt to comply with a provision therein requiring the exhaustion of local remedies. Application was not given, in view of the claimant's contractual obligation, to Article V of the General Claims Convention in which the need to exhaust local remedies as a condition precedent to the allowance of a claim had been dispensed with by the two Governments. Consequently the *Fisheries* claim was dismissed for lack of jurisdiction without prejudice to the right of the claimant to employ such other legal remedies as it may have elsewhere. It is interesting to note that the late Judge Parker concurred in the disposition of the *Dredging Company* case.

In his dissenting opinion in the *Fisheries* case, Dr. Nielsen critically analysed the majority opinions, as well as that in the case decided in 1926, and expressed himself, in the following language with reference generally to the effect of the Calvo clause:

". . . neither a Nation's domestic legislation nor a contract it may make with a private individual or business concern can nullify another Nation's right of interposition, secured by the supreme law of the members of the family of nations, nor nullify an international covenant. Whatever may be said of the ethical principles of an individual who takes action at variance with the terms of a contract he signs, his action can of course not result in setting aside either a Nation's constitution or the law of nations."

The status of the administration of General Victoriano Huerta who succeeded to the Presidency at the conclusion of the Tragic Ten Days in Mexico City in February, 1913, came before the General Claims Commission, as constituted in 1926, in the claim of *George W. Hopkins,*[18] involving the non-payment of postal money orders issued by Mexican postoffices in the early part of 1914. In this claim, the Commission distinguished between the "personal" acts of the administration of President Huerta and the "unpersonal" acts of the Mexican Government. In imposing liability upon Mexico, the Commission stated that the acceptance of money orders is a routine matter conducted by the governmental machinery in every country and is not affected by changes in higher administrative offices. It indicated that it would not impose liability upon Mexico for so-called "personal" acts of the Huerta administration which had for their purpose the maintenance of that administration in power.

A decision of importance is that in the case of *Fanny P. Dujay*[19] in which the Commission held that the maxim of the common law, *actio personalis moritur cum persona,* could not properly be applied in an arbitral proceeding. Replying to the contention of Mexico that the claimant, the widow of Captain Dujay, could not recover for the losses and damages sustained by his wrongful imprisonment in Tampico, Mexico, in 1884, it pointed out that, since the principle of survival of actions in the countries of the world is not uniform, international tribunals should not be precluded from making a final pronouncement on the merits of such a controversy because a limitation on rights of action might be existent in some particular system of local jurisprudence. It added, if such were the case:

". . . Arbitration as the substitute for further diplomatic exchanges or forces would fail in its purpose. The unfortunate delays incident to the redress of wrongs by international arbitration are notorious. Injured persons often die before any redress is vouchsafed to them. A decision of this

12. Ops. Comm., 1927, p. 108.
13. See, generally, comments on opinions by Professor Edwin M. Borchard, Amer. Jour. Int. Law (1926), Vol. 20, p. 536; (1927) Vol. 21, p. 516; and (1931) Vol. 25, p. 735; and by Professor James W. Garner, Brit. Year Book of Int. Law, (1927) p. 179; (1928) p. 156; (1930) p. 220, and (1931) p. 166; see, particularly, article by the Honorable C. L. Bouvé, American Agent in this arbitration, in Revue de Droit Int., (1930) Ser. 3, Vol. II, p. 660, and, statement by Dr. Clyde Eagleton, in his treatise, The Responsibility of States, etc., p. 194.
14. See article by Margaret Lambie relative to *Costello* claim, Ops. Comm., 1929, p. 252, in Amer. Jour. Int. Law (1930), Vol. 24, p. 264.
15. Ops. Comm., 1931, p. 207.
16. Ops. Comm., 1927, p. 21. The British-Mexican Commission in 1930 followed this decision in the claim of the *Mexican Union Railway, Ltd.*, the British Commissioner dissenting, Amer. Jour. Int. Law (1930), Vol. 24, p. 388.
17. See comment on Calvo clause prepared by the research in international law of the Harvard Law School, *ibid.*, (April, 1929) Vol. 23, spec. suppl. p. 202.
18. Ops. Comm., 1927, p. 42.
19. Ops. Comm., 1929, p. 180.
20. Ops. Comm., 1929, pp. 20 and 23.

kind would seem to put a premium on such delays which would be conducive to the nullification of just claims."

Two cases of particular interest are those of the *Northern Steamship Company* and the *Oriental Navigation Company,*[20] which involved the question of the right of the *de jure* government to close by decree ports which were in the *de facto* control of insurgents during the de la Huerta revolution of 1923. No steps were taken to prevent ingress or egress by means of an effective blockade. A Mexican federal gun boat which appeared at Frontera compelled two ships of these American companies, which did not have clearance documents issued by the *de jure* authorities, to depart from that port before they had completed discharging and loading their cargoes. A majority of the Commission took the position that as the Mexican gun boat partly commanded the port, the lawfulness of the action of the gun boat in "forcing off" these cargo ships, which were lacking in clearance documents, "can hardly be challenged."[21]

Dr. Nielsen, in a considered dissenting opinion took a position which accords with the policy of the United States, and is supported by precedent, that effective blockade is necessary in the closure of a port in the control of insurgents.

As illustrative of other problems considered in the opinions of the General Claims Commission, there may be mentioned: The bases of translation of depreciated paper money in circulation during the revolutionary period in Mexico into United States currency,[22] the non-responsibility of Mexico for the discharge by General Huerta of an American from his employment because of the occupation of Vera Cruz by American troops;[23] the responsibility of Mexico for its failure to afford special protection to an American Consul who was wounded by an unidentified marauder after a threat of assassination in the event of the execution of Sacco and Vanzetti[24] and responsibility for the improper invalidation of postage stamps[25] legally issued.

As has been seen, awards were made to American claimants as early as 1926, but under Article IX of both Conventions the United States would not receive from Mexico the amount of any awards until the conclusion of the proceedings of the Commissions. That amount when received, under the Act of Congress of February 26, 1896 (29 Stat. L. 32) would be held by the Government as a trustee for the claimants. The Honorable Morris Sheppard introduced in the United States Senate on January 6, 1930, a bill (S. 3725), "For the payment of the claims of citizens of the United States against the Republic of Mexico." This bill provided that payment of awards rendered American claimants should be made within a stated period shortly after the rendition of such awards; thus the burden of awaiting the receipt of payment from Mexico would be shifted to the Government. No action, however, was taken on this bill by Congress, and it was reintroduced on Dec. 18, 1931 by Senator Sheppard.

Through the Conventions of 1923 there was afforded to two great nations of the North American Continent an opportunity to settle finally by judicial process many questions which had been casting a shadow over their friendly relations. Whether, with the arbitration incomplete, the Governments now prefer to leave unanswered the questions which have not already been met and decided, and to determine by some extra-judicial method the amount to be paid to the United States by reason of Mexico's liability to American claimants, rests with the future to disclose. International arbitration has attained a place of importance in the relationship of nations. This arbitration is one of more than seventy-five to which the United States has been a party, and it has entailed substantial financial outlay on the part of both Governments. If attention is directed to only the 166 decided claims, it may seem to have failed, in the light of some 5700 docketed claims, to produce results commensurate with the time, effort and money expended; but, as has been mentioned, aside from the decided claims, several hundred of the docketed claims in various stages of development under the formal procedure of pleading have been filed with the Commissions. Whatever may be the estimate of the arbitration thus far, it is clear that its contribution in the development of international law through the decided cases is noteworthy.

21. See article by Professor Edwin D. Dickinson, Closure of Ports in Control of Insurgents, Amer. Jour. of Int. Law (1930), Vol. 24, p. 69.

22. Claims of *George W. Cook*, Ops. Comm., 1927, p. 318, and 1931, p. 162. As showing questions which arise in the consideration of claims, see address by the Honorable Green H. Hackworth, Journal, Vol. XVII (March, 1931), p. 193.

23. *E. R. Kelley*, Ops. Comm., 1931, p. 82.

24. *William E. Chapman*, Ops. Comm., 1931, p. 121.

25. *George W. Cook*, Ops. Comm., 1927, p. 311.

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CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

CLARENCE DARROW. By Charles Yale Harrison. 1931. New York: Jonathan Cape & Harrison Smith. Pp. 380.—Clarence Darrow, perhaps more than any other living lawyer, typifies the American conception of the great criminal lawyer, and in this biography, which is largely an account of his outstanding cases, we find, I think, the reason. We see Darrow the fighter, eloquent and colorful, fighting the good fight and gaining the victory. Courage and success have a wide and deep appeal.

The story of Darrow's early life races rapidly from his birth in Kinsman, Ohio, in 1857, up through a normal boyhood; his years at the University of Michigan; and the short period of practice that preceded his decision to go to Chicago, where he entered practice in 1887. There his ability was quickly recognized and he soon had an enviable practice with rich and powerful clients.

His defense of Debs cost him most of his corporate clients, and marked the beginning of his career as a defender of those charged with crime. From this point the author follows him through his most important cases, and we see him pitted against Borah in the defense of Big Bill Haywood—defending the McNamara brothers, and then himself against the charges growing out of that case.

While his participation in important cases, and his speeches and writings on crime and its punishment, brought him to the attention of many, it was the highly sensational Loeb-Leopold case that brought him a national fame. After the account of that case there follows the story of the Scopes case,—in which Darrow matched wits with Bryan—the story of the defense of Dr. Sweet in Detroit, and of the Fascists in New York.

The author uses the cases to show the development of Darrow's social and economic views and his style in expressing them, rather than to illustrate his methods of advocacy. Lawyers will miss a more determined effort by the author to capture something of Darrow's art as a great jury lawyer.

Even though Darrow the crusader overshadows Darrow the lawyer, the bar will find the biography an interesting and entertaining account of many hard fought cases, and of a long and useful life.

* *

Gaynor. By Louis Heaton Pink. 1931. New York: The International Press. Pp. 256.—I suspect that outside of New York but little is known of Gaynor except, perhaps, that he was mayor of New York, and that it was he who wrote the opinion in the famous *Pater Noster* case.[1] Yet, for many years, as a lawyer and as a judge he was much in the public eye, not because he was great but because he was unusual. His legal career does not warrant a biography and this volume will not repay a reading unless one is particularly interested in the careers of lawyers or in the political history of the city of New York during the thirty years preceding 1912.

* *

Personal and Professional Reminiscences of an Old Lawyer. By John A. Pitts. 1930. Kingsport, Tenn.: Southern Publishers. Pp. 381.—This volume contains a series of short articles that appeared serially in a Tennessee newspaper and, being addressed to its readers, will be, for the most part, of but limited interest to the bar outside of Tennessee. Still, in the judge's stories of early trials and unusual characters there is much of interest, and then too there is many a chuckle in store for the reader.

The author's memory can take him back over sixty years of active practice and one cannot help but wish that Judge Pitts would put his hand to doing for the bar of Tennessee what William A. McCorkle, Esq., did for the bar of West Virginia in his admirable book *The Recollections of Fifty Years*.[2]

* *

Franklin D. Roosevelt. By Ernest K. Lindley. 1931. Indianapolis: Bobbs-Merrill. Pp. 379.—The careers of many lawyers have been deflected into politics though seldom quite so quickly as was that of Franklin D. Roosevelt, governor of the state of New York.

Finishing his legal studies at the law school of Columbia University, Roosevelt became associated with the law firm of the famous James C. Carter, and was counted a young lawyer of industry and promise. But he soon gave up the practice of the law to enter state politics and at the age of twenty-nine was a state senator. His political career from then on is fairly well known and it is the sole concern of his biographer.

Anyone interested in governor Roosevelt's public career or in the recent political history of the state of New York will find the volume of considerable interest.

* *

Crowded Years. By William G. McAdoo. 1931. New York: Houghton Mifflin Co. Pp. 542.—To have been given crowded years is one thing, to crowd them into a readable and interesting autobiography still another. For the first William G. McAdoo thanks Fate, for the second we thank him. *Crowded Years* is a welcome addition to the biographies of lawyers who have achieved distinction.

A long and adventurous road lies between the charming account of his early life in Marietta, Georgia, and his resignation from the Wilson cabinet,—the period covered by this volume.

Not a great deal of space is devoted to his career as a general practitioner and most of the story concerns

1. *Kerr v. Kerr*, 134 App. Div. 141 (1909), 118 N. Y. S. 801.

2. G. P. Putnam's Sons. New York. 1928.

the years following his meeting with Woodrow Wilson. The material has been well chosen and proportioned, and presented in an engaging and flowing style. Lawyers will read with interest that it was he who suggested the appointment of Mr. Justice Brandeis to the supreme court, and thank him heartily for spiking the rumor that president Wilson repented of his choice.

The book is commended to students of government and politics, admirers of Woodrow Wilson, and, of course, to all admirers of William G. McAdoo himself.

* *

Smith of Birkenhead. By H. A. Taylor. 1931. London: Stanley Paul & Co. Pp. 288. This biography deals almost exclusively with the political career of that remarkable man who became the leader of the English bar, and the youngest lord chancellor in recent centuries. It touches but briefly on his career as a lawyer and as a judge. The book, except in matters of detail, adds little to Ephesian's *Lord Birkenhead.*

As a political biography it is an interesting account of an ambitious and colorful career.

* *

Justinian. By G. P. Baker. 1931. New York: Dodd, Mead & Co. Pp. 430.—The title of this biography is certain to arrest the attention of lawyers, and at once there will come to mind—what has it to tell us of Justinian's part in developing and codifying the Roman Law? The answer is that it tells us nothing. The biography is a rather sketchy history of the Roman Empire during the reign of Justinian, told in terms of military and political events. In short the book has no special appeal to lawyers.

JOSEPH HOWLAND COLLINS.

New York City.

Our Lawless Police. By Ernest Jerome Hopkins. 1931. New York: The Viking Press. Pp. xiii, 379.—The author, a newspaperman and investigator, in this work gives us an appalling, if illuminating and instructive, picture of conduct and regular practice of the police of some of the American cities, which are not only unlawful, but are also shameful and disgusting.

"False arrest, brutality with arrest, unlawful detention, incommunicado, and the 'Third Degree'" with relative incompetence in skillful and lawful investigation and detective work, are here made to appear the normal state of matters in some sixteen large cities; and it is more than suggested that this deplorable condition prevails generally throughout the Union. In Dallas alone we are told there have been 10,000 cases of unlawful arrest in fifteen months; 100 typical cases of the "Third Degree" have been selected as illustration; the "stool-pigeon racket," the "bail-bond racket," the shyster lawyer, "framing," "drives," police brutality, assault, battery, mayhem and even homicide—all are given full attention, 110 instances of vile outrage being given *in extenso.*

Such allegations would be considered almost incredible, were it not that the Associated Press the other day sent broadcast to the world the news that the chief of police of a large city instructed his men to fire first, and aim above the waist, while the mayor stood by and wished them God-speed.

The justification of the police is necessity, "the tyrant's plea"; it is alleged that what with technical objections, archaic practice, over-attention to trifling defect and unimportant detail, and to matters of no real significance, it is most difficult to procure a conviction without a confession; and that it is better that some irregularity in police practice should occur than that the criminal should be allowed to run at large, defying the law.

All these things will some day have to be taken in hand. The American people are notably long-suffering, but when they do wake up, look out for thoroughness—witness the World War.

WILLIAM RENWICK RIDDELL.

Osgoode Hall, Toronto.

A Collection of Nationality Laws of Various Countries. Edited by Richard W. Flournoy, Jr., and Manley O. Hudson. 1929. New York: Oxford University Press. Pp. xxiii, 776.

Citizenship. By Charles Hartshorn Maxson. 1930. New York: Oxford University Press, 1930. Pp. viii, 483.

The relationship between the individual and the state—both the state to which he owes allegiance and any other sovereignty with which he comes into contact—has assumed increased importance in recent years. As a result, the preparation of appropriate textual material upon the subjects of nationality and the rights and duties of citizenship has been stimulated.

Prior to the publication of Flournoy and Hudson's Collection of Nationality Laws the lawyer in private practice, as well as government counsel, confronted with a nationality question involving foreign law, usually experienced difficulty in locating the desired statute upon naturalization, citizenship, or expatriation, and particularly in securing an accurate English translation. The state department itself lacked a complete set of current foreign texts. This collection in English, prepared in connection with the research in international law under the auspices of the faculty of the Harvard Law School, contains in part I the nationality provisions of the constitutions and statutes of some 87 states, colonial and insular possessions, and mandated territories. Part II comprises those portions of the texts of treaties, conventions and other agreements which relate to nationality and military service, arranged in two groups. The first group contains twelve multipartite agreements; the second, 54 bipartite ones, all arragned in alphabetical and chronological order by countries. Valuable bibliographies, brief historical summaries of legislation, a helpful table of contents and an exhaustive index are included. The texts and translations are mainly from official sources, and the secretary and other officials of the state department assisted the editors by permitting the use of its material and other facilities. Richard W. Flournoy, Jr., assistant to the legal adviser, department of state, and reporter on nationality for the Harvard research, has dealt for many years with the international aspects of nationality problems. Manley O. Hudson, Bemis Professor of International Law, Harvard Law School, and director of the research, has served for several years as legal adviser to the League of Nations. Both editors participated in the first conference on the codification of international law at The Hague, 1930, for which the compilation was prepared and used.

The value of this scholarly and comprehensive work to practitioners, jurists, legislators and administrative officers throughout the world cannot be overesti-

mated. It is to be hoped that current supplements will be published from time to time.

* * *

Charles Hartshorn Maxson, professor of political science at the University of Pennsylvania, has produced a different type of book in his "Citizenship." His material consists of lectures delivered in a course bearing that title. He suggests "Status and Fundamental Rights" as a sub-title. The wide scope of the topics which he has treated in less than five hundred pages is shown by the chapters in the first half of the book on the status of aliens, non-citizen nationals, women, children, Negroes, Indians, and orientals born in the United States, and immigration, naturalization, citizenship, expatriation, and private and public corporations. This section particularly is interest arousing, presented as it is with a freshness of view and in popular rather than technical style. The second half is a study in constitutional law, being primarily a discussion by the author of the individual in relation to the various provisions of the bill of rights of the federal constitution. A table of cases is appended. In view of the merits of the book, one is somewhat reluctant to voice criticism. Yet it would have been helpful if all citations to the laws of the United States had been to the volume and page numbers of the Statutes at Large, and greater care had been exercised in consulting the latest and most authoritative sources. On page 97 appears the statement that aliens who have made their declarations of intention to become citizens "have the right to vote in all elections, State and National, in Arkansas, Indiana, Kansas, Missouri, Nebraska, Oregon, South Dakota, Texas, and Wisconsin—nine States." The source given is the late Frederick Van Dyne's well-known Treatise on the Law of Naturalization of the United States, published in 1907. A recent study of this question* (issued, it is fair to state, after the publication of Professor Maxson's text) shows, however, that of the eleven States in which at the beginning of the present century aliens were permitted to vote, all have withdrawn the privilege—Alabama in 1901, Colorado in 1902, Wisconsin in 1908, Oregon in 1914, Kansas, Nebraska and South Dakota in 1918, Arkansas in 1920, Indiana and Texas in 1921, and Missouri in 1924.

Regardless of such items and of the necessity for compression in order to treat of so many topics, Professor Maxson's study will be warmly welcomed and appreciated by both the legal profession and laymen.

HENRY B. HAZARD.

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*Leon E. Aylsworth, University of Nebraska: The Passing of Alien Suffrage, The American Political Science Review, Vol. XXV, No. 1, February, 1931, pp. 114-116.

Personal Actions at Common Law. By Ralph Sutton. With a preface by the Right Hon. Lord Atkin of Aberdovey. 1929. London: Butterworth and Co. Pp. xv. 220.—There are few law books of modern times of which it is at all safe to speak as classics. Of these at any rate is Maitland's *Equity and Forms of Action.* We venture to think that Mr. Sutton's book is not unworthy of a place beside its distinguished predecessor, for its author has many of Maitland's qualities—scholarship, insight, understanding, and above all a charm of style and a gentle humor which combine to make the older forces interesting and to galvanize them into a valuable life. Indeed, we must confess that we have thrice carefully read Mr. Sutton's work, and we believe that it has provided us with some of that "illumination" to which Lord Atkin refers in his preface,—an illumination always welcome, when we remember, as he points out, that nearly the whole of commercial law and most of the law of contract and of torts were developed under the system of special pleading which Mr. Sutton so admirably surveys.

For lawyers in those jurisdictions where the old common law procedure in a greater or lesser degree survives Mr. Sutton's book will be a veritable boon in advice, in incentive, in direction. To common lawyers who practice where the reforms after the Common Law Procedure Act, 1852, more or less hold good, it will be almost equally valuable, since any practice worthy of the name, whether in court or in chambers, calls for adequate skill in using the old reports. And it is impossible to read these intelligently or to use them with advantage without a knowledge of the older system. Indeed, no one can read Mr. Sutton's "Moot" cases of the traveller shot in the leg on a public footpath, or of the cattle killed on the railway line, without seeing that it is worth while to distinguish "trespass" and "case," to take down Hobart or Strange or Williams's Saunders, or to reread *Sharrod v. L. & N. W. R.* (1849) 4 Ex. 580; or, if it is necessary to advise on "false imprisonment," to realize that a knowledge of *Magnay v. Burt* (1843) 5 Q. B. 381 is a good foundation.

In addition, whatever the artificiality and rigidity of the old system it is impossible, after reading Mr. Sutton's book, to deny that it at least made the issues clear, or to dispute his conclusions that modern reforms, with their ease in amending pleadings, "have developed into a tendency to ignore the pleadings entirely and to allow a case to proceed though it is one which the opponent has had no opportunity of preparing to meet."

We confidently recommend this book to those of the profession who are, or aspire to be, more than mere technicians. It will prove a delightful and profitable companion, as its place is among those few law books whose value is as indefinable as the classical qualities which they possess. It is a book which our legal friends will borrow and never return—members of Charles Lamb's "great race," with "a liberal confounding of those pedantic distinctions of *meum* and *tuum.*" Here, we respectfully submit, will arise many issues of title to property. We may not care to fight them out on the principle laid down by Lamb's Mr. Comberbatch; but shall we claim in "detinue" or in "trover," or shall we join the claims? We can consult Mr. Sutton. Alas, he is gone!

W. P. M. KENNEDY.

University of Toronto.

International Adjudications, Ancient and Modern, History and Documents, together with Mediatorial Reports, Advisory Opinions, and the Decisions of Domestic Commissions, on International Claims. Edited by John Bassett Moore. Vols. 1-3. New York: Oxford University Press, 1929-1931.—The appearance of these volumes marks an event of the first importance in the field of law, history and letters. Judge John Bassett Moore, in the encyclopedic work of which these volumes are the first instalment, has drawn upon his wide learning as a lawyer and a historian and upon his experience as a statesman to place before the world the complete record of all known arbitrations or adjudications between nations, supple-

mented by advisory opinions, mediations, and decisions of domestic commissions. The work may require seventy-five or more volumes, and is designed to be continuous. Judge Moore has divided the work into two series, an ancient and a modern, the latter commencing with the arbitrations under the Jay Treaty of 1794 between the United States and Great Britain. That treaty of itself marked an epoch in the peaceful adjudication of international disputes by reviving arbitration, a process which for nearly three centuries had fallen into desuetude.

The three volumes under review embody an account of the proceedings of the arbitral commissions under two articles of the Jay Treaty—the 5th article, relating to the determination of the boundaries between the United States and Canada, and more particularly the identification of the river which was mistakenly named, in the peace treaty of 1783, the St. Croix (covering two volumes), and the 6th article, by which the United States assumed the obligation of compensating British creditors for the losses sustained through the impairment by American states after 1776 of the right of British creditors to recover their debts from American debtors (to which the third volume is devoted). The fourth volume will deal with the arbitration under the 7th article of the Jay Treaty, covering the claims of American citizens arising out of wrongful captures of American vessels by British naval forces and of British subjects for losses due to seizures made by the United States of British vessels in violation of American neutrality or made by vessels armed in United States ports.

Volume I begins with an Introduction and Historical and Legal Notes of some 96 pages, which constitute a unique and penetrating analysis of the concepts of adjudication, judicial action, and arbitration in the light of theory and practice in municipal and international law. Probably Judge Moore himself, by the original publication in 1896 of his "History and digest of international arbitrations to which the United States has been a party," but which includes foreign arbitrations also, has done more than any one else to make the awards of international tribunals a "source or evidence of law," the subject of an important section. Since that time, the awards of international tribunals, now multiplied by the frequent establishment of claims and boundary commissions and given added dignity by the establishment of the Permanent Court of Arbitration (1899) and the Permanent Court of International Justice (1921), have become a major source in the growth and development of international law. Judge Moore has exploded the myth, sedulously purveyed and thoughtlessly repeated in disparagement of the ephemeral and *ad hoc* international tribunal, to the effect that international arbitration was a process of compromise or political adjustment, as distinguished from the work of a law court such as would be a permanent international court, which, it was asserted, would cut through an issue rigorously by applying exclusively rules of law regardless of where the chips fell. The judicial process, as Judge Moore shows (p. xc), is not devoid of the element of compromise, and possibly it could be said that in balancing of considerations political views occasionally have been influential. But that this element is not confined to arbitral tribunals is evident in the many decisions of municipal tribunals, including those of the United States Supreme Court and, among others, in the recent opinion of the Permanent Court of International Justice in the Austro-German Customs Union case. That it is a characteristic of international arbitral tribunals to any greater extent than it is of other tribunals is an assumption destitute of foundation. Judge Moore has, it is believed, laid this rumor to permanent rest and written its obituary.

The record of the two arbitrations reported in these volumes follows the historical and, for the most part, the chronological method of presentation. It pursues the narrative form, in the light of the documents, which are either reprinted or summarized. The whole is clarified by the explanatory remarks of Judge Moore, modestly described as "editor," who brings to the task an erudition unequalled in the field of international law and rarely equalled in the field of American history. His description of events and personalities, frequently illumined by sage and humorous comment, mellows and enlivens the record. The reproduction of source material, some of which had not heretofore been generally known, would alone entitle the work to high rank. Judge Moore's painstaking analysis of the arbitral proceedings by which the "St. Croix" River was found to be the Scoodiac, as contended by Great Britain, and not the Magaquadavie, as contended by the United States, will probably leave nothing further to be said on that important historical event. The contribution that the arbitration made to American cartography is not the least important of its many features.

The third volume, dealing with the arbitration under Article VI of the Jay Treaty, embodies the account of the work of a Mixed Commission which ultimately broke down, mainly because of an unbridgeable difference of opinion as to the duty of claimants to exhaust their local judicial remedies before appearing before the international tribunal, and as to the meaning of "lawful impediments" erected by the states to the recovery and value of the claims of British creditors against American debtors. The proceedings of the Commission are fully described in the light of documents, the discovery of some of which, described by Judge Moore, is one of the romances of research. The arbitration represents not only an important stage in American history, but in international law. The views of the members of the Commission on the exhaustion of local remedies and on other legal questions have played an important part in the history of the subjects. The confiscation of private property (here debts) which some of the American states effected, and which the United States after the breakdown of the Commission finally agreed to make good by the payment to Great Britain of £600,000 under the treaty of 1802, closed a practice which, with the exception of minor lapses of the Confederate states and the legerdemain involving the Chemical Foundation patents in 1919, has not since marred the pages of American history. Judge Moore terminates the record with the full report of the proceedings in Great Britain for the distribution of the indemnity among the British creditors, together with an account of the proceedings of an earlier British domestic commission for the reimbursement of "loyalists," who had suffered special losses in the United States by reason of their loyalty to Great Britain.

The publication of these volumes, the crowning achievement of one of the most notable careers in American public and scientific life, is a source of con-

gratulation and inspiration for American scholarship.

EDWIN M. BORCHARD.
Yale University School of Law.

Solution of Problem in February Issue

The nearest neighbor of the conductor could not live in either Toronto or Hamilton, as the conductor lived halfway between Toronto and Hamilton. Consequently he could not be Mr. Robinson, who lived in Hamilton, or the namesake of the conductor, who lived in Toronto,—he must be Mr. Jones or Mr. Smith.

This nearest neighbor could not be Mr. Jones, as it is impossible to pay precisely the third of $1,505.00, consequently he was Mr. Smith.

The conductor was not Robinson because his namesake lived in Toronto, whereas Mr. Robinson lived in Hamilton; nor was he Smith, because Mr. Smith did not live in Toronto. He was, then, Jones.

The fireman was not Smith (as Smith beat him at billiards) nor was he Jones. He was Robinson.

The engineer, then, was Smith.

Leading Articles in Current Legal Periodicals

VIRGINIA LAW REVIEW, December (University, Va.)—Fraudulent Conveyances at Roman Law, by Max Radin; The Supreme Court and State Police Power, 1922-1930, by Thomas Reed Powell; Organization and Licensing of Accounting Corporations, by John H. Bishop.

St. Louis Law Review, December (Fulton, Mo.)—Restatement of the Law of Contracts with Missouri Annotations, by Tyrell Williams; Anent the Statute of Westminster I and Liability, by Erwin F. Meyer; Corporations and the Tax Laws, by Ralph R. Neuhoff.

Columbia Law Review, December (New York City)—Corporate Devices for Diluting Stock Participations, by A. A. Berle, Jr.; The Restatement of the Law of Trusts, by Austin Wakeman Scott; Builder's Measure of Recovery for Breach of Contract, by Edwin W. Patterson.

Rocky Mountain Law Review, November (Boulder, Colo.)—The United States Senate and the Treaty Power, by Forrest R. Black; Jurisdiction for the Taxation of Shares of Stock, by Benjamin S. Galland; The Statute of Frauds in Colorado, by A. A. Goldstone.

Journal of Criminal Law and Criminology, November (Chicago)—The Public Defender, by Charles Mishkin; The Tasks of Criminal Psychology, by Hans W. Gruhle; Bygone Phases of Criminal Justice in England, by William Renwick Riddell; Architectural Environment in Penal Treatment, by Sanford Bates; Social Agencies and Crime Prevention, by Harry M. Shulman; The Juvenile Court Movement in Ohio, by F. R. Aumann; Felony Trials in Michigan Counties, by W. Abraham Goldberg; Penal Reform and Criminology in China, by Ching-yueh Yen; Racketeering, a Contribution to a Bibliography, by Katherine O'Shea McCarthy; Responsibility for Prison Conditions, by E. R. Cass.

Wisconsin Law Review, December (Madison, Wis.)—Wisconsin Legislation, Regular Session 1931, by John B. Sanborn; "Arising out of and in the Course of the Employment," in Workmen's Compensation Laws—Part I, by Ray A. Brown.

Philippine Law Journal, October (Manila)—A Critical Study of the Acquisition of Ownership Under Article 1942 in Relation to Article 444 of the Civil Code—by Tomas de Castro y Gerona; The Development of Representation in the Philippines, by Roberto Regala (continuation).

Illinois Law Review, January (Chicago)—Some Problems under the Illinois Statute Against Accumulations, by Merrill Isaac Schnebly; The Federal Anti-Injunction Bill, by Jay Finley Christ; Restatement of the Law of Contracts—Illinois Annotations, by Harold Wright Holt.

Virginia Law Review, January (University, Va.)—Water and Water Courses—Riparian Rights—Diversion of Storm or Flood Waters for Use on Nonriparian Lands, by Horace A. Teass; The Meaning of the Provisions for Recordation of a Transfer as Applicable to Preference Under the Bankruptcy Act and a Critique of the Decision of the United States Supreme Court in the Case of Moore v. Bay, by R. Carter Scott, Jr.; The Supreme Court and State Police Power, 1922-1930, by Thomas Reed Powell.

Yale Law Journal, January (New Haven, Conn.)—Some Functional Aspects of Bankruptcy, by William O. Douglas; The Parol Evidence Rule as a Procedural Device for Control of the Jury, by Charles T. McCormick; Services in the Home—A Study of Contract Concepts in Domestic Relations, by Harold C. Havighurst; Declaratory Judgments against Public Authorities in England, by W. Ivor Jennings.

Columbia Law Review, January (New York, N. Y.)—Commercial Letters of Credit; Effect of Suspension of Issuing Bank, by Julius L. Neidle; A Factual Study of Bankruptcy Administration and Some Suggestions, by William O. Douglas, J. Howard Marshall; Dissenting Shareholders: Their Right to Dividends and the Valuation of Their Shares, by Benjamin M. Robinson.

California Law Review, January (Berkeley, Cal.)—Compulsory Unit Operation of Oil Pools, by W. P. Z. German; Waiver of Jury Trial in Felony Cases, by J. A. C. Grant; The Prospect for Administrative Tribunals, by Marshall E. Dimock.

Law Notes, January (Northport, N. Y.)—Why Prohibition Failed, by Edward A. Craighill, Jr., Punitive Damages in Malpractice Cases, by Joseph T. Buxton, Jr., Exemption of College Fraternity Property from Taxation, by Carl V. Venters; Property in Dogs, By Berto Rogers.

Texas Law Review, February (Austin, Tex.)—Facts, Opinions, and Value-Judgments, by Herman Oliphant; Automobile Forfeitures and The Eighteenth Amendment, by Roy W. McDonald; Conflict of Laws—Validity of Contracts—Texas Cases, by George Wilfred Stumberg.

Michigan State Bar Journal, January (Ann Arbor, Mich.)—"An Ounce of Prevention—" by Robert M. Toms; Report of the Committee on Criminal Jurisprudence; Foreign Diplomats and the Prohibition Laws, by Lawrence Preuss; Transfer of Future Interests, by W. Lewis Roberts; Old English Local Courts and the Movement for Their Reform, by Arthur Lyon Cross; Alteration or Replacement of Buildings by the Long-Term Lessee, by Marvin L. Niehuss.

Commercial Law Journal, February (Chicago)—On Service of Bankruptcy Process by Publication, by Paul R. Kach; United States vs. Macintosh—A Symposium; Injunctive Powers of the Federal Judiciary, by Hal. M. Black; Chain Store Taxation by Hugh E. Willis; The Law's Delay, by Bentley M. McMullin.

Canadian Bar Review, January (Toronto)—An Extra-Legal Approach to Law, by Cecil A. Wright; Death Taxes in Manitoba, Part II, by Harold Douglas Barbour; Lambard's "Archeion"; A Three Century Old Law Book, by William Renwick Riddell; Statute of Westminster; A Great Political Philosopher, by Charles Morse.

Notre Dame Lawyer, January (South Bend, Ind.)—Fatuous Cross-Examination, by Walter R. Arnold; The Law of Christian Marriage, by John H. A. Whitman; Federal Trade Commission and its Due Process of Law, by Henry Ward Beer; Individual Personal Liability of Bank Directors for Negligent and Excess Loans, by John A. Skiles; The Use of Sound Films in Trial Courts, by Edward T. Lee.

Law Notes, February (Northport, N. Y.)—Anti-Tobacco Legislation, by C. S. Wheatley, Jr.; Modification or Repeal and the Webb-Kenyon Act, by Harry Rockwell; Humanitarian Homicide, by Joseph T. Buxton, Jr.

Washington Letter

Proposed Anti-Injunction Legislation

THE Senate Judiciary Committee on January 27, by a vote of eleven to five, ordered a favorable report on Senate Bill 935, introduced by Senator Norris, to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes.

Senator Norris, on February 4, submitted the report, with amendments to the bill (Senate Report No. 163), and the measure was placed on the calendar. Senator Hebert, on behalf of the minority of the committee, asked that time be allotted until February 11, within which to prepare the views of the minority. Senator Norris replied that he had no objection, if it could be understood that that should not interfere with the consideration of the bill by the Senate if it should be reached in the regular course of procedure.

When asked how soon he expected to take up the bill for consideration, Senator Norris replied: "I should like, if I can, to take it up as soon as we get through with the bill which is now before the Senate."

This is the first time the bill has had a majority report out of the Judiciary Committee. The bill was on the calendar at the last session of Congress on a minority report.

Declaratory Judgments

On January 18, the bill to amend the Judicial Code by adding Section 274 D, providing for declaratory judgments (S. 33) was referred to a subcommittee of the Senate Judiciary Committee, composed of Messrs. King, Austin and Walsh.

On the same date, the bill (S. 2655), providing for waiver of prosecution by indictment in certain criminal proceedings, was referred to a subcommittee composed of Messrs. Bratton, Waterman and Austin.

On January 14 the bill introduced by Representative Free (H. R. 7238) to amend Sec. 5 of the suits in admiralty act, was referred to a subcommittee of which Mr. Montague of Virginia is chairman.

On January 21, Senator McNary introduced S. 3176, to establish a laboratory for the study of the criminal, dependent, and defective class.

On January 22 Senator King (by request) introduced S. 3223 relating to the qualifications of practitioners of law in the District of Columbia.

On January 25, Senator Johnson introduced S. 3243 to amend Section 24 of the Judicial Code. The Bill would add to the first paragraph of Section 24 (USCA Title 28, Ch. 2, Sec. 41, page 32) the following:

"Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative Board or commission of a State, or to enjoin, suspend, or, restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, and/or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State.

"Sec. 2. The provisions of this Act shall not affect suits commenced in the district courts, either originally or by removal, prior to its passage; and all such suits shall be continued, proceedings therein had, appeals therein taken, and judgments therein rendered, in the same manner and with the same effect as if this Act had not been passed."

On January 9, Representative Sinclair introduced H. R. 7365 to establish a Federal Trade Court. The Court under this measure would be composed of a Chief Justice and eleven Associate Justices, the jurisdiction of the Court would extend to "all suits, actions, or proceedings, civil or criminal, at law or in equity arising under, or authorized by, the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July 2, 1890; the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, as amended; and the Act entitled 'An Act to create a Federal Trade Commission, to define its power and duties, and for other purposes,' approved September 26, 1914. Such jurisdiction shall be exclusive and shall extend to and include all jurisdiction both original and appellate, under said Acts now possessed by the district courts and the circuit courts of the United States and the judges thereof."

On January 11, Representative Baldridge introduced H. R. 7430, amending Section 17 of the Bankruptcy Act. Among other changes the Bill provides that a discharge would not release a bankrupt "for necessaries of life furnished him or his family for which he is indebted: Provided, That all debts contracted for within the period of four months prior to the filing of a petition in bankruptcy shall be construed to have been contracted for with intent to defraud unless otherwise proved by the bankrupt."

On January 21, Representative Butler introduced H. R. 8170 amending Section 14 of the Bankruptcy Act and providing that,

"The failure to receive a discharge in a bankruptcy proceeding by reason of neglect to apply for a discharge within the time limited by this section shall not be construed to preclude the bankrupt, in a subsequent proceeding in bankruptcy, from obtaining a discharge from the debts which were scheduled and provable in such prior bankruptcy."

On January 20, Representative Gilbert introduced H. R. 8079 to regulate the admission of evidence in certain actions in the Courts of the United States. The Act provides:

"That in any action, properly brought in a court of any State and transferred to any court of the United States for the sole reason that the parties thereto are citizens of different States, it shall be competent to prove such facts as could have been proved in the courts of the State in which said action was properly pending, and said evidence shall have the same probative value in the courts of the United States as is given it by the courts of last resort in the State from which said action was transferred."

On January 28, H. R. 7121 to repeal obsolete statutes, and to improve the United States Code, was reported to the House of Representatives by Mr. Harlan, together with House Report No. 296. The purpose of the bill is to repeal 28 additional obsolete and superseded sections of the Revised Statutes now in the United States Code which have been recommended to the Committee by the Navy, Post Office, Justice, Treasury, and Commerce Departments for repeal as being obsolete and superseded.

The Sections of the Revised statutes to be repealed with the U. S. Code citations, are as follows:

R. S. 89, Title 2, Sec. 136; R. S. 340, Title 15, Sec. 180; R. S. 972, Title 28, Sec. 820; R. S. 2458, Title 16, Sec. 591;

R. S. 2459, Title 16, Sec. 592; R. S. 2461, Title 16, Sec. 595; R. S. 2462, Title 16, Sec. 596; R. S. 2628, Title 19, Sec. 41; R. S. 2644, Title 19, Sec. 46; R. S. 2645, Title 19, Sec. 47; R. S. 2938, Title 19, Sec. 378; R. S. 3297, Title 26, Sec. 421; R. S. 3911, Title 39, Sec. 296; R. S. 3912, Title 39, Sec. 297; R. S. 3972, Title 39, Sec. 490; R. S. 3973, Title 39, Sec. 491; R. S. 3999, Title 39, Sec. 521; R. S. 4056, Title 39, Sec. 788; R. S. 4316, Title 46, Sec. 256; R. S. 4317, Title 46, Sec. 257; R. S. 4334, Title 46, Sec. 287; R. S. 4340, Title 46, Sec. 281; R. S. 4341, Title 46, Sec. 282; R. S. 4342, Title 46, Sec. 283; R. S. 4343, Title 46, Sec. 284; R. S. 4344, Title 46, Sec. 285; R. S. 4345, Title 46, Sec. 286; R. S. 4371, Title 46, Sec. 317.

On January 29 Mr. Beck (by request) introduced H. R. 8634, to provide fees to be charged by clerks of the district courts of the United States. The bill was referred to the House Judiciary Committee.

Election of President, Vice-President, and Representatives in Congress

On February 2, the late Mr. Rutherford, presented House Report No. 345 on Senate Joint Resolution 14, proposing an amendment to the Constitution of the United States fixing the commencement of the terms of President and Vice-President, etc. The recommendation of the committee was to strike out all after the resolving clause and substitute a new measure.

On January 28, Senator Hebert introduced S. 3357 and S. 3358 to amend the Patent laws. Both measures were referred to the Senate Committee on Patents.

Revenue Revision, 1932

On January 25, Richard S. Doyle, speaking for Mr. Robert Coulson, chairman of the committee on Federal Taxation of the American Bar Association, appeared before the Committee on Ways and Means, House of Representatives, and testified in connection with the hearings on the revenue bill. He presented the views of the committee on Federal taxation with reference to the administrative and other provisions of the revenue acts. His testimony appears in Volume No. 9 of the hearings before the Committee.

Building and Loan Associations

The Bill (S. 2199), exempting building and loan associations from being adjudged bankrupts, has been passed by the Senate and House and now goes to the President.

According to Senate Report 120 on the measure, there have been several decisions holding that a stockholder in a building and loan association is not a creditor within the meaning of the bankruptcy act. This act changes the law and puts building and loan associations in the same class as municipal, railroad, insurance and banking corporations.

On February 5, Representative Dyer introduced H. R. 8904, to extend the provisions of section 721, Revised Statutes, so that the general or common law and the equity jurisprudence of the several States shall be regarded as the rule of decision of the Federal courts in cases where they apply. The bill provides that section 721 of the Revised Statutes (U. S. C., title 28,725) be amended to read as follows:

"Sec. 721. The law of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as the rule of decision, in the courts of the United States, in cases where such law applies."

On the same day Representative McGugin introduced H. R. 8930, providing "that section 4 of the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July 2, 1890, as amended (U. S. C., title 15, sec. 4), is amended by adding at the end thereof the following sentences: 'Provided, That no department of the United States, executive or judiciary, shall have any jurisdiction to pass upon the reasonableness of any combination in restraint of trade or to excuse any combination or conspiracy in restraint of trade from prosecution. The sole question to be determined by the court is whether or not there has been any combination or conspiracy which is or was in restraint of trade.'"

On the same day, Representative McKeown introduced H. R. 8913, providing for the filing of an affidavit declaring the plaintiff has not violated the anti-trust laws of the United States in actions at law and in equity in the United States courts, and for other purposes.

Tariff on Oil

Pointing out that a tariff on oil might be made the initial step in a legislative program to bring order in the oil industry, Secretary Wilbur has rendered a favorable report to the Senate Committee on Commerce on Senator Shortridge's bill, S. 3, to regulate commerce between the United States and foreign countries in crude petroleum and fuel oil and all distillates obtained from petroleum, including kerosene, benzine, naphtha, gasoline, paraffin and paraffin oil, subject to consideration by other governmental agencies of the administrative features of the bill and its proposed rates.

Emphasizing that if a tariff on oil is to be made effective it must adequately protect consumers and our export and bunker trade, and should be paralleled by State legislation providing for coordination of proration and conservation as among the oil states, and pointing out that the states should be given permission to effect such coordination through an interstate compact, Secretary Wilbur said he favored a tariff on oil as a part of such a program.

Address of Solicitor General

Solicitor General Thomas D. Thatcher in an address before the New York State Bar Association in New York City, recently, stated that

"It is fair to say that 70 per cent of the petitions for certiorari and appeals taken to the Supreme Court during the past term were considered unworthy of a hearing upon the merits."

According to the Solicitor General "it does seem that this burden of futile litigation, which is constantly increasing, must result from a failure by the members of the profession to thoroughly understand the limitation imposed upon the exercise of the statutory and discretionary jurisdiction of the court.

"I call the situation to your attention, not in any spirit of criticism, but merely with the suggestion that counsel owe a duty to the court to advise their clients to forego vain hopes that the court will depart from its settled practice and take under review their cases, simply because there is ground for thinking that they have been wrongly decided.

* * *

"The best service counsel can perform for a client is to be able to tell him, and to convince him if necessary when his cause is lost, that further litigation is an expensive luxury—enjoyed only by the lawyer at the expense of his client."

LIMITATION OF ARMAMENTS

Washington Conference and Position of Various Powers in Regard to Armament Reduction—The Nine-Power Agreement for the Integrity of China and Four-Power Treaty for Security in the Pacific—Conference of 1927 to Agree on Limitation of Ships of War Not Included in Washington Conference — London Conference of 1930 and Compromise There Reached — French Demand for Security Agreement—The Preparatory Commission for Disarmament Conference and the So-Called Draft Treaty, Etc.*

By William B. Hale
Member of the Chicago Bar

[The Editor of the Journal feels that its readers will be glad to read and keep for reference Mr. Hale's impartial and satisfactory digest and summing up of the series of significant events dealing with the question of disarmament. The subject is one of present and future importance, and one in which lawyers certainly feel a deep interest. The address furnishes a background against which the deliberations of the Conference of 1932 and future developments in this field may be more intelligently viewed. The importance of the subject and its appeal to lawyers sufficiently explain what might otherwise be regarded by some as the publication of an article rather outside of the Journal's chosen field.]

ON November 12, 1921, the commanding figure of Charles Evans Hughes, then Secretary of State of the United States, appeared before the world in the Washington Conference and proposed the first plan for the limitation of great armaments which ever resulted in an effective agreement.

The proposed plan was:

That all capital shipbuilding programs, either actual or projected, should be abandoned;

That certain specific ships, which he named, should be scrapped by the United States, Great Britain and Japan. These amounted to a total of sixty-six capital fighting ships, built and building, with a total tonnage of 1,878,043; that there be no replacement tonnage for ten years and that replacement be limited to an aggregate maximum of capital ship tonnage for the United States 500,000 tons; for Great Britain 500,000 tons; for Japan 300,000 tons; that, subject to the ten-year limitation, capital ships be replaced when they are twenty years old, and that no capital ship be built of more than 35,000 tons;

That a proportionate allowance of other combat craft be prescribed.

The plan adopted by the Conference and embodied in a treaty between the United States, Great Britain, France, Italy and Japan was Mr. Hughes' plan for capital ships for the United States, Great Britain and Japan.

For France capital ships were fixed at 175,000 tons and for Italy at the same amount.

Aircraft carriers were limited: For the United States at 135,000 tons; for Great Britain at 135,000 tons; for France at 60,000 tons; for Italy at 60,000 tons; for Japan at 81,000 tons.

A limitation was placed upon the size of guns to be carried by aircraft carriers, and it was further provided that no auxiliary vessel of war exceeding 10,000 tons shall be acquired by any of the nations.

The treaty also included an agreement by the United States, Great Britain and Japan that the status quo with regard to fortification of naval bases should be maintained in their insular possessions in the Pacific Ocean.

The plan thus adopted is, however, but a small part of the story of the Conference. The discussion which took place at Washington in this Conference, relating more particularly to the failures of the Conference than to its accomplishments, reveals in vivid contrast the fundamental views and purposes of the great nations of the world on the principal phases of the whole difficult subject of army and navy limitation.

The Conference was called to consider the general subject of the limitation of armaments in connection with which Pacific and Far Eastern questions should also be discussed. The invitation was extended to all the nations which had been called the allied and associated powers during the war because, as Mr. Hughes explained, by reason of the conditions produced by the war these powers controlled at that time the main armament of the world and the opportunity to limit armament lay within their grasp. Belgium, China, The Netherlands and Portugal were also invited and took part because of their interest in questions relating to the Far East.

The reason for discussing the Far Eastern question was because it was part of our purpose at the Conference to bring to an end the Treaty of Alliance between Great Britain and Japan which was concluded in London in 1911.[1] Therefore, they were confronted at the outset with the question which has so often been disturbing as to whether an agreement of security (in this case especially for Japan) should precede or follow an agreement on the limitation of armaments. Mr. Hughes, in characteristic fashion, stated in his opening address that it would be most unfortunate if the subject of armaments should be postponed, but that the security questions in the Far East were equally important. He therefore thought that it would be

*Address delivered before the Law Club of Chicago, December, 1931.

1. Conference on the Limitation of Armaments, Washington, 1921, p. 160.

entirely practical through the distribution of work among designated committees to make progress on both subjects at the same time without either being a hindrance to the other.[2]

It also appeared in the invitations to the Powers and the opening addresses that the policy of the United States for the reduction of armaments was based upon the belief that armaments should be reduced for economic reasons and also because rivalry in armaments is a constant menace to the peace of the world rather than assurance of its preservation. As later stated, at the Geneva Conference of 1927, in a memorandum submitted by the United States:[3]

"The conviction that the competitive augmentation of national armaments has been one of the principal causes of international suspicion and ill will leading to war is firmly held by the American Government and people; hence, the American Government has neglected no opportunity to lend its sympathy and support to international efforts to reduce and limit armaments."

At the same time, in reference particularly to the situation in the Far East, it was recognized by our government that the reduction of armaments was not particularly hopeful unless the desire for peace found expression in a practical effort to remove causes of misunderstanding and in seeking ground for agreement as to principles and their application.[4] In other words, we then recognized, at least with respect to the Pacific, that some sort of assurance or security must be afforded by international treaties in connection with the reduction of armaments.

This latter was the position strongly taken by Mr. Briand, representing France at Washington, who, after the statement of the Chairman, made the first speech. In this address, which dwelt considerably upon the sacrifices which France had suffered in the war and emphasized their great desire for peace, he stated almost at the outset that if France were offered "the opportunity of obtaining the security which she has the right to demand in order that peace may be assured and if at the same time she is called upon to sacrifice some of her armament in order to secure that peace, France is ready to consent to these sacrifices."[5]

Soon thereafter he enlarged upon this subject and, pointing out the serious situation of France as against renewed German aggression, stated positively that France could not then consent to consider in the Conference any matters relating to land armament.[6] In this connection he said:

"It takes two to make peace; yourself and your neighbor. To make peace—I speak from the standpoint of land armament—it is not enough to reduce armies and decrease munitions of war. . . . A nation must also be surrounded by what I may call an atmosphere of peace; disarmament must be moral as well as material. I have the right to say, and I hope to be able to prove, that in Europe as she is at the present time there are still the last grave elements of instability—nations of such a character that France is forced to look them in the face and to measure their consequences from the point of view of her own safety."

But he further stated:[7]

"When we consider the limitation of armament from the naval point of view, we have the freedom of decision and assurance in our hearts and minds; we are among friends; no threat of war is before us; the possibility of danger is remote. Nevertheless—you do not acknowledge your right to ignore it—you still maintain adequate fleets and you are right in doing so to safeguard your prestige upon the seas and to insure your existence should it be threatened. From the land point of view the danger is imminent—it surrounds us; it prowls; it hangs over our heads."

Mr. Balfour, in restating Mr. Briand's position, put it as follows:[8]

"It is because, in the language of Mr. Briand, there has been, in matters maritime, a moral disarmament, and it is on the basis of this moral disarmament that the physical and material disarmament is going to be built. That is why we are hopeful about the naval question. And why are we less hopeful about at least any immediate settlement of the military question? It is because, as Mr. Briand has explained to you, there has not been moral disarmament—because we have no assurance or because the French Government, who watch these things closely, have no assurance that either in Russia or in Germany moral disarmament has made the degree of progress which would make material disarmament an immediate possibility."

Mr. Briand was also much concerned at the charges of French Imperialism, and the attacks on the French position in refusing to consider land armaments that appeared extensively in the press during the Washington Conference. In his opening address he said:[9]

"At no period of their history have the people of France been inspired by sentiments of imperialism or conquest."

And later he said:[10]

"The deceptive specter of imperialistic France may still have duped a few artless and credulous minds; it will soon evoke nothing but smiles. There is no more room for any form of imperialism in a world which has been liberated by our common effort. . . . Has France made such a frightful sacrifice in order to save the world only to be charged now with wanting to commit the crime which she has helped to punish? If she keeps a strong enough army—an army which she is now reducing—if she must still bear the crushing burden of military charges, is it not because her territory, twice invaded in fifty years by the same enemy, still remains exposed to insolent threats of revenge and because the peace of the world is menaced along with her?"

Pursuant, therefore, to Mr. Briand's ideas, the Conference did not attempt at all to deal with land armaments. It succeeded in reducing and limiting capital ships and airplane carriers. With respect to other auxiliary vessels no agreement could be reached, and it appears from the discussion that ensued between Mr. Sarraut (after Briand had returned to France) and Mr. Balfour that France did not admit that the moral disarmament which was recognized by Briand in regard to the navy in general applied so far as to relate to submarines. Mr. Balfour brought forward what was called the British Empire Plan on this subject. Mr. Balfour stated that the British Empire delegation desired formally to place on record its opinion that the use of submarines, whilst of small value for defensive purposes, leads inevitably to acts which are inconsistent with the laws of war and the dictates of

2. Conference on the Limitation of Armaments, Washington, 1921, p. 52.
3. Geneva Conference 1927, 70th Congress, 1st Session, Senate Document No. 55, p. 3.
4. Conference on the Limitation of Armaments, Washington, 1921, p. 4.
5. Conference on the Limitation of Armaments, Washington, 1921, p. 68.
6. Conference on the Limitation of Armaments, Washington, 1921, p. 116.
7. Conference on the Limitation of Armaments, Washington, 1921, p. 128.
8. Conference on the Limitation of Armaments, Washington, 1921, p. 136.
9. Conference on the Limitation of Armaments, Washington, 1921, p. 68.
10. Conference on the Limitation of Armaments, Washington, 1921, p. 254.

humanity, and the delegation desired that united action should be taken by all nations to forbid their maintenance, construction or employment.[11]

This had also been emphasized in a speech by Lord Lee, First Lord of the Admiralty, and it was strongly urged many times by other members of the British delegation.

Meanwhile Mr. Briand had returned to France, and Mr. Hughes wrote him a letter, urging that France should not adhere to her desire previously expressed to build ten new capital ships and urging that the agreement between Great Britain and Japan would depend upon the acquiescence of France. In reply Mr. Briand stated as follows:[12]

"With regard to the tonnage of capital ships—that is to say, ships of offense—which are the most costly—I have instructed our delegates in the sense you desire. I am certain that I shall be sustained by my parliament in this course.

"But so far as defensive ships are concerned, like cruisers, torpedo boats and submarines, it would be impossible for the French Government, without running counter to the vote of the Chambers, to accept reductions corresponding to those which we accept for capital ships. . . ."

"The dominating idea of the Washington Conference is the restriction of offensive and costly naval armaments. But I do not believe it to be any part of its program to restrict a nation which, like France, has a large extent of coasts and numerous distant colonies, in the means essential to its communications and security."

Mr. Sarraut stated that the French position was that the submarine is the only weapon which permits a nation scantily supplied with capital ships to defend itself at sea. For France, therefore, the submarine was an essential means of preserving her independence, especially in view of the sacrifices to which she had consented in the matter of capital ships. The submarine was merely a vessel of defense. They believed it was possible to reconcile the use of submarines with the laws of humanity. France must possess submarines of a very large cruising radius in order to safeguard its lines of communication with the colonies. The irreducible minimum for France in submarines was 90,000 tons.[13]

It appeared at the same time, by figures presented by the Chairman, that the tonnage in submarines then existing and building was as follows: United States, 95,000 tons; Great Britain, 82,464 tons; France, 42,850 tons; Italy, 20,228 tons; Japan, 31,400 tons.

Lord Lee attempted to show for Great Britain that the submarine had not been effective in the Great War against any ships of war, and it was therefore not a defensive instrument but only a menace to commerce. In this respect it was a very great danger.

Admiral LeBon for France cited facts to show that the submarine had, as a matter of fact, been effective in the Great War against battle ships and that their use against merchant vessels should be confined within limits that would render that use legitimate and not so destructive as in the Great War when they were so badly misused by Germany.

The report of the Advisory Committee of the American delegation stated that the submarine was particularly an instrument of weak naval powers and was valuable for defense. This, therefore, corresponded more nearly with the French view than with the British.

At these large demands of France for defensive submarines Mr. Balfour was greatly shocked. He knew that the French friendship for Great Britain was sincere,[14]

"but no present expression of goodwill, however sincere, could control the view. Facts were facts; and when one tried to combine the military policy announced by Mr. Briand with the naval policy announced by Mr. LeBon, one could not fail to see that there was a naval and a military scheme strangely incoherent and inconsistent. Men would inevitably ask themselves: What is the ultimate end underlying all that is being done? Against whom is this submarine fleet being built? What purpose is it to serve? What danger to France is it intended to guard against? He knew of no satisfactory answer to such questions."

Then, growing rather sentimental, he pointed out the peaceful history of Great Britain:[15]

"It seemed to him incredible that anybody could think that the British fleet was intended as a prelude to British domination over weaker neighbors. Without going into the depths of history, let it be observed that for the whole of the Nineteenth Century, after the Peace of Paris in 1815, Great Britain possessed sea power which had no rival. . . . But was the history of Great Britain during those years one favorable or unfavorable to peace? Favorable or unfavorable to liberty? . . . He could not imagine anybody who read history supposing that, even if the sea power of Great Britain in the century which was to come was comparable to her relative sea power in the century which had passed, the liberties of the world would have anything to fear."

Mr. Balfour also pointed out that Great Britain had had many conflicts with France; that Great Britain had always been superior in naval armament and always inferior in land forces, and that never in the history of France had she had to fear the power of Great Britain "to strike a blow at her heart." No inferior military power had ever yet been able to invade or seriously imperil a superior military power merely because she had more ships.[16]

But the position of France remained unchanged. They demanded 90,000 tons of submarines and 330,000 tons of auxiliary craft besides.[17]

The Italians demanded parity with France. Senator Schanzer for Italy, having explained the special geographical position of Italy, said:

"Under such conditions, the first fundamental principle of our naval policy consists in this: That Italy's fleet should be equal to the strongest fleet of any of the powers situated on the Mediterranean. If we consider that Italy has many maritime neighbors on the Mediterranean and on the Adriatic and that today she cannot count, as was the case before the War, on the cooperation and support of a strong allied fleet, these will not seem excessive pretensions."[18]

The position of Japan throughout the Conference with reference to actual navy limitation was in general an acceptance of the American proposals. They immediately accepted Mr. Hughes' plan for the reduction of capital ships.[19]

The United States, Great Britain and Japan were the first to agree upon this limitation, subject

11. Conference on the Limitation of Armaments, Washington, 1921, p. 554.
12. Conference on the Limitation of Armaments, Washington, 1921, p. 460.
13. Conference on the Limitation of Armaments, Washington, 1921, p. 486.
14. Conference on the Limitation of Armaments, Washington, 1921, p. 542.
15. Conference on the Limitation of Armaments, Washington, 1921, p. 544.
16. Conference on the Limitation of Armaments, Washington, 1921, p. 584.
17. Conference on the Limitation of Armaments, Washington, 1921, p. 570.
18. Conference on the Limitation of Armaments, Washington, 1921, p. 272.
19. Conference on the Limitation of Armaments, Washington, 1921, p. 450.

to suitable agreement with France and Italy as to their capital ships. The Japanese position on the reduction of auxiliary craft was not clearly stated. It was supposed that Japan had consented to the proportionate allowance originally proposed by Mr. Hughes. This was afterwards denied in the London Naval Conference of 1930.

In view, however, of the American and British desire to terminate the Anglo-Japanese Alliance, the discussions preliminary to the Conference had brought about the Japanese requirement for security. The American consent to this proposal resulted in the negotiation at the Conference of both the Four-power agreement for security in the Pacific and the Nine-power agreement for the integrity of China.

This Nine-power agreement provided that the contracting parties agree:

(1) To respect the sovereignty, independence and the territorial and administrative integrity of China;

(2) To provide the fullest and most unembarrassed opportunity to China to develop and maintain for herself an effective and stable government;

(3) To use their influence for the purpose of effectually establishing and maintaining the principle of equal opportunity for the commerce and industry of all nations throughout the territory of China;

(4) To refrain from taking advantage of conditions in China in order to seek special rights or privileges which would abridge the rights of subjects or citizens of friendly States and from countenancing action inimical to the security of such States.

They further agreed not to support any agreements by their respective nationals with each other designed to create spheres of influence or to provide for the enjoyment of mutually exclusive opportunities in designated parts of China's territory.

They further agreed that whenever a situation arises which, in the opinion of any one of them, involves the application of the stipulations of the Treaty and renders desirable discussion of such application, there should be full and frank communications between the contracting powers concerned.[20]

The Four-power treaty provided that the United States, Great Britain, France and Japan should respect their several rights in relation to their insular possessions and insular dominions in the region of the Pacific Ocean, and that if there should develop a controversy, arising out of any Pacific question which was not satisfactorily settled by diplomacy and was likely to affect the harmonious accord between them "they shall invite the other high contracting powers to a joint conference to which the whole subject will be referred for consideration and adjustment." Also, that if such rights are threatened by the aggressive action of any other power, the parties to the Treaty should communicate with one and other, fully and frankly, in order to arrive at an understanding as to the most efficient measures to be taken jointly or severally to meet the exigencies of the particular situation.

The conference also adopted another Treaty, limiting the use of submarines in warfare; and many resolutions were adopted relating to specific rights in China.

It will thus be seen that in the Washington Conference the positions of the powers were in general as follows:

The United States adopted, in calling the conference, the theory that excessive armaments lead to war and should therefore be limited for the purpose of maintaining peace as well as for economic reasons, and that at least with respect to the Pacific a Treaty of Security might also be entered into which provided for a conference in the event of any difficulties arising under it. We also firmly maintained our principle of the open-door in China and of the theory that no nation should acquire any special rights either political or economic over any other nation in China.

The French position was strongly held that security in the nature of some sort of a treaty should accompany the reduction of land armaments and that this also applied to sea armaments, especially to submarines. At the same time they recognized that no treaty of security was necessary for the reduction of capital ships. On the French theory capital ships related to offensive and submarines related only to defensive warfare.

Great Britain attempted, without avail, to secure an agreement for the complete abolition of the submarine as an instrument of war and consented to the reduction of capital ships from the outset. With respect to warships excluding the submarine their position was not clearly stated, since this whole question was evaded on account of the excessive French demand for such auxiliary ship tonnage.

The Japanese demanded security in the Pacific and consented to the American policy with respect to China. They cooperated fully with the United States on the reduction of capital ships and seemed also to be in accord with respect to the reduction of auxiliary craft. Their whole policy was apparently based upon the theory that, being so far away from the United States, their navy on a 5-5-3 basis would be a sufficient defense in case of war with the United States.

The position of Italy was merely that they demanded parity with France.

Conference of 1927

After the ratification of these treaties, the reduction in capital ships duly took place as agreed upon. But there began a building program of auxiliary vessels with respect to which the Washington Conference had failed.

It was, therefore, appropriate that a further conference be held in order, if possible, to agree upon a limitation of all ships of war not included within the Washington Treaty. President Coolidge called such a conference to meet in Geneva in June, 1927.

In 1925 the American Government had accepted the invitation of the League of Nations to participate in the discussions of the Preparatory Commission for Disarmament which had been formed under the auspices of the League. President Coolidge therefore, intending to assist this

20. Conference on the Limitation of Armaments, Washington, 1921, p. 1625.

commission, requested in his invitation to Great Britain, France, Italy and Japan that the delegates to the meeting of the Preparatory Commission should be given power to negotiate a special agreement on naval armaments supplementing the Washington Treaty. He thought that, by isolating this problem from the general matter of reduction of armaments, there might result a distinct benefit to the general disarmament plan which the nations in the League had found so difficult on account particularly of its task respecting land armaments in Europe.

Great Britain and Japan immediately accepted the invitation. In fact, it appears in the correspondence that the British Government itself was planning to call a conference of this character or to attempt by diplomacy to reach some agreement.

France and Italy declined the invitation. In so doing Mr. Briand for France explained that it was unwise to call a conference of only a few of the powers on this subject because all nations had some light cruisers and other war vessels and ought to be in the conference. Also, that the conference of only a few would weaken the attempt made by the League to deal with all nations alike, and that the matter of smaller vessels being only for defense was, so far as France was concerned, the same subject matter as land armaments which likewise were maintained only for defense. They also insisted that a limitation should be based upon total tonnage which any nation should be free to distribute according to its necessities.

In spite of the refusal of France and Italy, the Conference met and sat during June and July at Geneva in 1927. Here again the principal delegate for the United States, Mr. Hugh Gibson, proposed a definite plan for limitation. This was to extend the 5-5-3 ratio to cruisers, destroyers and submarines. He presented definite tonnage limitations for each of these classes.

Opposed to this a British plan was presented and also a Japanese plan.

This first British plan related principally to replacements and the limitation of the size of cruisers. It also proposed again the abolition of submarines. It did not, therefore, disclose at first the large British program for numbers of cruisers.

The Japanese plan was substantially a proposal for maintenance of the status quo with special provisions as to replacements.

The great differences in the Conference, however, upon which it failed were soon made clear. Lord Jellico explained at length the experience of Great Britain in the World War, and attempted to demonstrate that although Great Britain at the time of the Conference in 1927 possessed only 45 cruisers, they needed 70. He arrived at this figure on the following absolute basis: With the British fleet of 15 capital ships, the number of cruisers needed for fleet work was 25. This left 45 out of a total 70 for trade route protection. Of this number 12 would be refitting or refueling at any given moment. With lines of communication 80,000 miles in length this left 1 cruiser for every 2,500 miles.[21]

He further stated that, at the outbreak of the Great War, Great Britain possessed 114 cruisers and, in spite of the fact that Germany had only a few, the British losses of merchant ships due to the action of these German vessels exceeded 220,000 tons and the allied losses were 30,000 tons before these cruisers were disposed of.

It was further shown at the Conference that the Americans desired a number of large cruisers of 10,000 tons each and very few light cruisers, while the British claimed that they needed only a few large cruisers and a large number of smaller ones.

Mr. Gibson pointed out the great difference between the two governments.[22] The British, he said, had at their disposal 888,000 tons of fast merchant ships, capable of being readily converted into cruisers and armed with many six-inch guns. The United States had only 188,000 tons of such ships; also, at the Washington Conference, the British Empire looked upon a total tonnage of service auxiliary craft of 450,000 tons as an acceptable and reasonable figure. But their program in 1927 was for 647,000 tons of these vessels. He could not, he said, understand what change had brought about these new demands. Other than the powers represented, there were in the entire world but five navies possessing modern cruisers of effective combat value. The strongest had approximately 72,000 tons and the total of all was less than 200,000 tons. The adoption of any such figures would not be a limitation of armaments, but an increase, and it would be unlikely that any of the powers would reach the maximum tonnage proposed before 1931. At that time the powers would meet again, pursuant to the 10-year limitation of the Washington Treaty of 1921. The proposed program would, therefore, require the United States to construct within that time a very large additional cruiser fleet.

No formula was found to reconcile the views of the two nations. The Conference adjourned, adopting a resolution which set out briefly the positions of the several powers and submitted the problem for further consideration to the three governments.

London Conference of 1930

The formation of the Labor Government in England in the summer of 1929 and certain further discussions in the League of Nations Preparatory Commission and the adoption of the Briand-Kellogg Treaty of February, 1928, brought about the calling of the London Conference. This conference convened on January 21, 1930.

Before the meeting there were negotiations between Great Britain, Japan and the United States. In these negotiations it became clear that the Japanese would not accept the 5-5-3 ratio for auxiliary ships. They contended that in the Washington Conference these figures related to capital ships alone. They said that the American claim, to the effect that a change in the 5-5-3 ratio might release the agreement for the maintenance of the status quo of fortifications and naval bases in the Pacific, was really not valid because the 5-5-3 ratio related only to capital ships and the agreement on naval bases was effective only with respect to large ships, for many harbors existed in which cruisers could be received. They therefore claimed a ratio of

21. Conference on the Limitation of Armaments, Washington, 1921, p. 42.

22. Conference on the Limitation of Armaments, Washington, 1921, p. 66.

10-10-7 in cruisers. They further stated that the policy of the Japanese Government is one of defensive parity. Its main desire was to possess a fleet strong enough to cope with any hostile fleet which might be sent to Japan and to keep up the lines of communication that connected Japan and the mainland of Asia, from which come essential supplies of food and raw materials. The consideration for accepting 60% strength in capital ships, they said, was the nonfortification agreement,—which Admiral Cato said was worth 10%.[23]

There appeared to be no new political bargain which the United States could make at London in order to persuade them to accept the 5-5-3 ratio for auxiliary ships. We had no outstanding political difference excepting only Japanese immigration. This could not be bargained with.

But the Japanese position was that naval strength was purely relative. This contrasted sharply with the British position which had been stated by Admiral Jellico in 1927 for an absolute cruiser strength and which was again presented on an absolute basis to the London Conference.

Great Britain, of course, recognized throughout the right of the United States to parity. It was stated in the Conference of 1921, also in the Conference of 1927. But the British demand for cruisers was so great that our delegates saw in this attitude an intention on the part of Great Britain to have a navy which, in fact, would be much greater than ours because it was supposed that we would not build up to the limitation provided in the Treaty.

Nevertheless, a compromise was reached. The British demand was reduced. The limitation was agreed to by categories; and a so-called "escalator clause" was adopted which allowed any nation to increase their tonnage if any nation not a party to the treaty should materially affect its interests by new construction. The British Government has let it be known that they will invoke the use of this clause in case French and Italian naval building threatens the British two-power standard in Europe.[24]

The Treaty was merely a limitation. It was in no sense a reduction. In some respects it was a considerable increase. A detailed comparison of various classes allowed in the treaty is impossible here. In general, however, the difference between the total tonnage of all auxiliary craft built and under age as of December 31, 1929, compared with the treaty allowances is as follows:

	Total Ships Existing	Treaty Allowance
United States	1,065,010 tons	1,123,600 tons
Great Britain	1,254,230 tons	1,151,450 tons
Japan	693,828 tons	714,120 tons

If a comparison is made between the existing ships plus those appropriated for and authorized as of the same date, a slight reduction is provided by the treaty for all three nations.

Moreover, the United States has not been building auxiliary craft at any such rate as has been the case with the other powers. Great Britain has built almost twice as fast as we have and Japan the same. France has built most of all, and Italy has built more than the United States. It is apparently not our purpose to build to the limit allowed in these treaties, but, as Admiral Pratt has recently stated, our purpose is to build to what future limitation conferences may provide rather than to what is now provided.[25]

It was, of course, apparent at the outset that the proposals of France and Italy could not be met. The acceptance of the French Government pointed out the position of France in no uncertain terms. Here again the French insisted upon political security. They stated that the Pact of Paris was not a sufficient basis to guarantee security They stated that they preferred to rely upon the covenant of the League of Nations which provided a basis for a complete system of security. But this apparently was not enough, for they said: "Just as a general technical agreement upon armaments implies a previous political agreement, so does a complete naval agreement presuppose an understanding on the question of the freedom of the seas, defining the rights of belligerents and the rights of neutrals and providing for the prospective cooperation of other fleets against that of an aggressor country." They also objected to a mathematical ratio, and claimed that a general reduction of armaments should be based upon the needs for security in each state so that no mathematical relation between the countries would necessarily be suitable. They suggested that, in view of the beneficial effects produced by the Four-power Pacific Treaty a similar agreement with more teeth in it be negotiated by the Mediterranean naval powers.[26]

The British thought that there might be inadequate provisions for sanctions in the various peace agreements, but stated that with the Covenant of the League, the Four-Power Pacific Pact, the Treaties of Locarno, the signature of the Optional Clause of the Statutes of the Permanent Court of International Justice by thirty-three countries and by the Pact of Paris the public expectation would be disappointed if no limitation on armaments could now be reached. The British did not desire a treaty of nonaggression between the Mediterranean powers.

Naturally, the Conference considered the French view at length. Without a security agreement the French demanded 724,497 tons of auxiliary ships.

There was no possibility of accepting this figure. So that it seemed inevitable that France and Italy could not be brought in without first negotiating a treaty of security which would include some agreements upon the freedom of the seas and involve thus a fundamental change in our supposed national policy in two respects.

Mr. Stimson, for the American delegation, pointed out that he had no objection to entering into a "consultative pact" as such. On the contrary he said that the United States is already a party to a number of treaties involving the obligation of consulting with other powers. He would not, however, enter into any treaty where there was danger of its obligation being misunderstood, as involving a promise to render military assistance or guaranteeing protection by military force to an-

23. Survey of Am. For. Relations, Yale University Press, 1931, p. 334.
24. Survey of Am. For. Relations, Yale University Press, 1931, p. 386.
25. Chicago Tribune, Nov. 13, 1931.
26. Survey of Am. For. Relations, Yale University Press, 1930, p. 341.

other nation. Such a misunderstanding might arise if the United States entered into such a treaty as a *quid quo pro* for the reduction of the naval force of another power.

This was certainly a conservative point of view.

Our Four-power Treaty in the Pacific was negotiated with Japan, Great Britain and France. Based on this treaty the Japanese accepted the 5-5-3 ratio; and yet no one for a moment supposes that the treaty contains, either directly or indirectly, any obligation on the part of the United States to come to the assistance of Japan in the event of war. Of course, if a consulting pact were negotiated with France alone the situation would be different. Then there might be raised a moral obligation to come to the aid of France, as there was a moral obligation upon Great Britain to come to her aid in 1914. But a consultative pact which involves several powers, which must, in the event of a dispute, be arrayed on each side, can contain no such implications.

Yet, it is probable that the French would not have consented to a reduction in their demands, even if we had entered into a consultative pact; because we certainly would not, under any circumstances, enter into a security agreement which involved a promise of military assistance against an aggressor.

When the London Conference was meeting the League of Nations had already been struggling with this subject of security for ten years. At the Conference of Versailles the purpose of President Wilson in writing the Covenant of the League of Nations was to rely principally upon conference and public opinion and very little upon actual sanctions. His purpose in this respect was not altogether consistent. At times he referred to the military and naval strength of the great powers being the final guarantee of the peace of the world. Lord Cecil has also been likewise inconsistent.[27] But the Covenant of the League, made as a compromise with the French extreme view, certainly depends for its effect mostly upon the creation of favorable public opinion rather than upon the use of sanctions.

At that time, on the Committee which wrote the covenant, was Mr. Leon Bourjois who was then a member of the French Senate and probably the most distinguished leader in the World for the promotion of peace by better international understandings. He insisted to the best of his ability that the League Covenant should not only provide definitely for sanctions but that the League itself should have an armed force which would form an international police. Also, it must be remembered that the Treaty of Assistance which was negotiated between France, Great Britain, and the United States at the Conference of Versailles never came into effect.

The French thus have been consistent throughout. They were not satisfied with the League Covenant as a basis for disarmament at the time it was adopted.

The Treaty of Assistance was therefore negotiated. This treaty failed, and France has continued their insistence for more security in the League of Nations, and especially in all of the meetings and proceedings with respect to the reduction of armaments.

And it must not be supposed that these attempts on the part of the League have altogether been in vain. In his standard work on disarmament Mr. Madariaga says:[28] "The solution of the problem of disarmament cannot be found within the problem itself, but outside of it. In fact, the problem of disarmament is not a problem of disarmament. It really is the problem of the organization of the world community." If this is right, and experience seems to show that it is at least partly so, then the experiments with political agreements which have been entered into and which have been written and discarded are all valuable as experiences in attempts at world organization on some basis which may make actual disarmament possible. In these experiments the League of Nations with great difficulty drafted first the Treaty of Mutual Guarantee. This treaty failed partly because of technical difficulty in defining an aggressor nation; largely because the British Labor Government was so uncertain of its tenure of office that they did not dare assume the risk. And the British note declining this treaty contained the extraordinary statement "that if the obligations created by the treaty be scrupulously carried out, they will involve an increase rather than a decrease in British armaments."

As a further attempt to satisfy the demand for security as a preliminary to disarmament, the so-called Geneva Protocol was prepared a year after the Treaty of Mutual Guarantee. This was a more carefully prepared treaty. Nevertheless it was rejected by Great Britain largely (as Mr. Madariaga says) because the British could not predict what the American attitude would be in view of our polity of the freedom of the seas and right to trade in time of war as a neutral with all belligerents.

Then the Treaties of Locarno were prepared and actually adopted.

With respect to all these treaties it must be noticed that no one of them furnishes the extreme security which has at times been demanded by France. They all provide for a more detailed method of solving any problems that arise between any nations parties to the Treaty. They give the Council of the League of Nations greater powers than are provided in the Covenant. They provide more explicitly that the nations concerned in any dispute shall maintain the status quo until it is settled by peaceable means, and shall recognize the jurisdiction of the Council. They provide for some economic pressure and that the aggressor in any war is the nation which refuses to submit the matters in question to peaceable settlement by arbitration or otherwise. They provide for the possibility of certain economic sanctions, but they do not provide for a League Army or that any particular nation will furnish any armed force at any time.

Obviously, the Kellogg Peace Pact provides for no such extreme security as the French demand. It is simply a treaty which provides that the nations who are parties to it renounce war as an instrument of national policy, and agree that the settlement of all disputes which may arise among them shall never be sought except by pacific means.

There is no provision for consultation in the

27. Disarmament, Salvador de Madariaga, p. 32.

28. Disarmament, Salvador de Madariaga, p. 56.

event that either a nation breaks or threatens to break the treaty.

It has been proposed at various times that some new treaty "implementing" this Peace Pact should be prepared, but nothing has been produced.

The League has also spent a very large amount of time on the technical end of disarmament—first through strictly military or professional representatives of all the different nations, then through a mixed commission of diplomats and technical experts, and finally in the Preparatory Commission for the Disarmament Conference. The work of the Preparatory Commission has now come to an end in the preparation by it of the so-called draft treaty for disarmament.

This draft treaty does not provide figures or actual limitations, but it presents a method or basis of discussion which is the result of a number of compromises, and it lays out in tables the various different aspects of disarmament in a way that can be presented to the General Disarmament Conference.

Some of the difficult questions which have thus been settled in the treaty are as follows:

The Preparatory Commission decided that the limitation of armaments is to be placed upon peace time armaments and not upon an ultimate war strength. As a corollary to this it was finally agreed, after long opposing arguments, that army reserves should not be taken into account, but that the number of men who can be in the military or naval service at any given time and the number of days which each recruit must serve may be limited. Great Britain and the United States, who formerly both protested against this plan, have consented that this should be done.

On account of differences of opinion, two methods have been provided for limiting war materials such as guns, rifles, army tanks, etc. The first is a direct limitation of numbers similar to that used in Navy limitation. But since these materials are much more difficult to limit than ships of war and probably would require international supervision, the Treaty provides alternately a budgetary limitation. To this the United States has particularly objected on the principal ground that it is difficult to select from the budgets of the various nations the amount actually appropriated for war purposes. It appears now, however, that this objection is likely to be withdrawn.

The method of limiting navies has been taken from the previous limitation treaties.

The method of limiting aviation strength has been restricted to military and naval aviation on the basis of the number of military airplanes and dirigibles. The draft treaty does not prohibit the construction of commercial planes.

To obviate the argument of France for a permanent disarmament commission to supervise and enforce the provisions of the Treaty and the objection of Great Britain and the United States to this proposal, the draft treaty provides for a permanent disarmament commission to act simply as a clearing house for nations in regard to disarmament, and to submit reports to the various nations under the counsel of the League.

The draft treaty also includes blanks which may be used and have been carefully worked out for the limitation of personnel and war material in the naval forces, the military forces and the air forces.

General Disarmament Conference

The date set for the beginning of the General Disarmament Conference is February 2, 1932. All members of the League have been invited; also the United States, Russia and Turkey. The meeting will be held at Geneva. It is difficult to predict what will happen. But certain outstanding events command the attention of the World.

We are in the midst of an economic depression which emphasizes the economic importance of disarmament in the way that it has never been known before.

A short time ago Secretary Mellon submitted to the Ways and Means Committee of Congress a statement on our national finances. He showed in this statement that the last fiscal year was closed with a deficit of $903,000,000; and that, unless increased revenues are provided, we are confronted this year with a prospective deficit of $2,123,000,000. Even if the additional taxes recommended by the administration are adopted and are as productive of revenue as is estimated, nevertheless the deficit for this year will be no less than $1,417,000,000.[29]

Thus one important result of the depression, in the United States, at least, is the burden on the taxpayers from the ordinary costs of government. We need no extraordinary building program for the navy to satisfy every possibility of great taxation. We need no building of unproductive ships and weapons of war to help us back to normal times and normal employment.

But our building program for the navy has not been sufficient to keep pace with the other nations, who are parties to the limitations fixed by the London Treaty. This underbuilding is so great that we cannot hope, by the result of the coming Disarmament Conference, to save much more than we are now saving by lagging behind the limits of the London Treaty.

In order to bring us up to this limit allowed by the London Treaty, Representative Vinson of Georgia has introduced a bill into Congress calling for a building program extending over a period of ten years and providing an aggregate sum of $616,250,000. But whether this program is carried out or not, or whatever period it covers, the necessary expenditure for the purpose of maintaining our fleet and of increasing it to the limits of the London Treaty is large. So that if by agreement with other nations we could save any substantial part of the necessary sums the conference would justify itself on this ground alone.

For no one wants this country to be permanently less powerful in defence than limitation treaties allow. The very state of the world in general, which many people are saying will defeat any result of the conference, demonstrates this fact. It also demonstrates that if the conference fails in this respect, there will be many voices in this country which will say to the administration that a great building program must begin at once. And this

29. New York Times, Jan. 14, 1932.

will especially be true if it is Japan that stands in the way of reduction.

Early in December, 1931, Secretary Stimson appeared before the Appropriations Committee of Congress to urge an appropriation for the expenses of the American Delegation to the coming Disarmament Conference. He then emphasized the fact that the Conference is directly aimed at some of the evils which have promoted the state of world wide depression. He also stated that the United States has not the same direct problem that we have had in some of the past conferences. Our navy, he said, has been limited by the treaties of Washington and of London, and our army is so small that it could not be regarded as a menace to anybody.

All of this may be true. It is certainly true that the limits have been set on our navy, and that our army is small. But our navy limits are far too high, and the navies of Great Britain and Japan are also too high. Moreover, the navies of France and of Italy have never been limited as to auxiliary craft. There has never been any limitation of fighting forces in the air. In all of these things the United States is vitally interested. We do not go to this Disarmament Conference to discuss these things as mere academic questions. Moreover, the Conference is to meet for the purpose of limiting sea as well as land armaments and armaments of the air. We cannot proceed to the Conference without a definite purpose to secure if possible some reduction in the London limitations, as well as to secure limitations of the land and air forces of many nations.

The President's moratorium on war debts also emphasizes the importance of reducing governmental expenses. From the debts as funded by the Debt Funding Commission we now derive about the sum of $250,000,000.00 a year—or rather we would be deriving this sum if it were not for the moratorium. Of this sum the payment on account of principal is less than one-quarter. The balance is interest. The average yearly payments of principal and interest for the whole period of sixty-two years over which the debts were funded is about $317,000,000. Of course, the debts have not been reduced or cancelled, and there seems to be a strong disposition on the part of Congress not to reduce them. But the moratorium was no doubt necessary; and by the postponement thus produced no payments are due until next December.

Meanwhile the Disarmament Conference will be held. Since the economic features of the reduction of armaments involve a consideration of all national budgets, the subject of international debts will indirectly be involved. For the United States it must be considered that the loss of these sums makes the reduction of our national budget in other directions all the more necessary. And we may also learn, by the attitude of the other nations, who are our debtors, as to whether it is wise or foolish to reduce these debts. Of course, it may be necessary to reduce or cancel the war debts on economic grounds alone. But if Great Britain comes to the Conference with the same absolute demands for a great navy of cruisers as were presented to the conferences of Geneva and London, we can hardly find much ground for belief that a reduction of their indebtedness will be founded on better hopes for the payment of the balance. If France demands the same great amount of auxiliary ships as has heretofore made it impossible to include any agreement with her on this subject, and if Italy continues to demand parity with France, much the same conclusion must be drawn. Thus, while we cannot trade debts for ships, or for any other reduction in armaments, we can more or less determine our debt policy by the attitudes of the nations in the Conference.

On the political side of the limitation of armaments we find the question of security, which has so long been the demand of France, and the question of conference or joint international action, both being tried out in the Manchurian situation as they have never been tried before.

In September, 1931, Japan started her program for the military control of Manchuria. The Chinese government had been unable for years properly to police the country, and various difficulties had arisen over the alleged treaty rights of the Japanese, particularly in connection with their railroad concessions. Probably the state of things justified the intervention to much the same extent that our intervention has heretofore been justified (if it has been justified) in Haiti, Santo Domingo and Nicaragua. But the Japanese were members of the League of Nations and were bound by the covenants in the Nine Power Treaty and the Kellogg-Briand Treaty. They proceeded, nevertheless, with their military occupation of Manchuria and have since proceeded into other parts of China. So that no one can doubt that a state of war now exists and that all of these treaties have been broken.

In this situation the United States found itself the leader in diplomacy in the Far East, a party to the Nine Power Treaty, but not included in the conferences in the Council of the League of Nations where the subject matter immediately came up for discussion. We were invited to send a representative to sit in the Council. The Japanese protested. Their protest was afterward withdrawn, and our position in the Council no doubt strengthened the decisions of the League to some extent. But it is apparent that the Japanese from the beginning have counted on our political isolation and, knowing that the other nations would on this account hesitate to follow our lead and that our interests are superior to any other nation's, have felt safe for a great adventure.

We have thus learned that there is something valuable to the United States in the theory of security which the French have always advocated—at least so far as an agreement for consultation is concerned. It is not for the benefit of France or any other foreign nation that we would enter into an agreement of this sort. It would be only for our own protection. Incidentally it might give help to others, though promising none. Incidentally it might help toward a reduction of armaments. But its main purpose would be to secure our release from the difficulty of negotiating common action when an emergency arises. For, in spite of the failure of the League and of ourselves so far with reference to China and Japan, we have at least learned two things from that problem: That common action is essential and that any obstruction to such

common action is an unnecessary element of danger.

We have discovered and applied the principle of plurality in our foreign affairs. We should render ourselves free to exercise it. We cannot, apparently, exercise a right of consultation in time of danger, for no such right is recognized without previous international agreements. Of course we can always exchange notes with any nation. But to meet together with the representatives of the nation or nations which are subject to criticism, and to call upon them to explain their positions and their intentions in a way which does not upset the delicately poised system of diplomacy, or offend national pride, cannot be done out of hand.

The Draft Convention for the Disarmament Conference provides for the setting up of a permanent Disarmament Commission in recognition that the reduction of armaments is not an isolated transaction, but a continuing subject of international relations. This Commission will, if formed, meet from time to time and consider the problems especially relating to the technical side of armaments. The treaty also provides that any party to it may upon notification to the other parties suspend the operation of the treaty in special circumstances. This is an important and dangerous reservation. And it would seem that the notification provided for should be fortified by provisions for the calling of a conference at the option of any party, in order to consider so important a subject.

Thus again, to preserve our own safety, we are driven toward the idea of established forms of international consultation—not to be arranged *ad hoc*, but provided in advance, so that there could be no suggestion of criticism or obstruction when such a meeting should be called. We should be released from unwritten restrictions by a definite treaty or treaties duly providing for our rights and the rights of other nations in that respect. And if it be said that international conferences are futile we must nevertheless recognize that they are as necessary as conferences in courts, in legislatures, and in Congress.

On the other hand the theory of French security is on trial. The French have always demanded that a security agreement be made which will provide that all nations unite against an aggressor nation. The Covenant of the League of Nations does not make this obligatory under all circumstances and this is why the French demand further security. They demand an agreement which will make military action necessary in order to stop an aggressor. But the Covenant of the League renders all nations who are members of the League free to exercise any such power if they desire to do so. Yet up to the present time it does not appear whether France will take this attitude toward Japan. According to all her theories of security, France should now be in the leadership urging common action against Japan, at least by way of economic blockade. If some other great power were now in one of the French colonies with a military expedition, we can be assured that France would be calling upon all the other members of the League to assist against such an aggressor. Of course, we cannot tell what the ultimate French action will be. Probably if common action is proposed by the United States and Great Britain France will join in. If this is found to be true, and if such common action stops war in the East, a precedent will be set in favor of a security agreement, including the United States. Whether such an agreement should provide for anything more than international conference can best be determined later. But so far it appears to be clear that when a situation arises, which is serious, the nations, including the United States, find it to their own advantage to interest themselves vitally in every detail of the event without prior commitment.

Meanwhile the Disarmament Conference will proceed. It will study a reduction of armaments in face of these and other equally difficult problems. No conference of importance was ever preceded by such a wave of defeatism as exists today. But we can not heed it. We must go ahead with determination. Fortunately we see no lack of such determination in the administration at Washington. The conduct of our proceedings with regard to Manchuria has been based upon a determination to support the rights of the United States and to take the best course in so doing with little fear of criticism. This attitude will probably be carried into the Disarmament Conference and, with all the problems of the world before it, there is at least a possibility that on that account the Conference will either directly or indirectly produce far-reaching results.

Criminal Legislation, 1931

(*Continued from page* 171)

any locality where imported birds are known to roost," prima facie guilty. So Vermont, No. 149, strengthens an old law prohibiting the taking of deer except in the open season, by making presumptive evidence of violation, the possession during the closed season of certain fire arms on land used by deer. New Jersey, Chapter 16, forbids cropping of dogs' ears and makes the possession of a dog with his ears cropped and the wound unhealed prima facie evidence of violation of the act by the person in control of the premises on which the dog is found, or having charge of the dog.

The presumption of one fact from another was used by Minnesota, Chapter 243, in the familiar law prohibiting the drawing of checks without funds. The law formerly allowed the making of the check to be prima facie evidence of intent to defraud; the new law adds that it shall also be such evidence of the knowledge that funds were insufficient and goes on to say that notice of protest is admissible as proof and is also prima facie evidence of a lack of funds when the check was drawn.

Several statutes provide for the securing of evidence. Kansas, Chapter 178, allows photostatic copies of fingerprint impressions from the bureau of criminal identification, to be evidence in a subsequent prosecution for the purposes of identification. California, Chapter 441, allows the records or copies of records in any state or federal penitentiary, certified by the official custodian, to be introduced as prima facie evidence of the fact that a person being tried for a crime has been previously convicted of an offense and imprisoned. Another form of getting evidence is Arizona, Chapter 57, which requires any physician, surgeon, nurse or hospital treating a person for gunshot or knife wounds, or other injury which may have resulted

from an illegal act, immediately to notify the chief of police or sheriff, giving the description of the patient and any other facts. A person who does not obey the law is guilty of a misdemeanor.

Vermont in another way encourages the giving of testimony. No. 38 grants immunity to witnesses subpoenaed for a prosecution or investigation of a violation of a criminal law providing for fine or imprisonment in a county jail or house of correction. The witness is immune from prosecution on account of anything as to which he testifies and his evidence shall not be used against him, except that he shall not be exempt from punishment for perjury in so testifying. Maryland, Chapter 398, abolishes the common law presumption that any offense, other than treason or murder, committed by the wife in her husband's presence, is committed under his coercion; and makes it legal for a wife to show, as a fact, on a charge against her other than treason or murder, that the offense was committed in the husband's presence and under his coercion. Thus another legal difference between a man and a woman is brushed away.

The difficult problem of procedure in case of the proof of insanity came up again in 1931. The tendency to depend more on medical evidence is apparent. Texas had a law allowing the court to impanel a jury to try insanity after conviction, when informed through affidavit of "any respectable person" that there was good reason to believe that the defendant was insane. Chapter 54 amends the law to require that the information on which the judge acts must consist of the affidavit of the superintendent of the state institution for the insane or not less than two practicing physicians, or the prison physician or warden of the prison where the prisoner is held, or the county health officer, and on this information allows the impaneling of the jury to try the insanity. Connecticut permitted a sheriff to apply to a judge for the appointment of a commission of three reputable physicians to examine the mental condition of a person committed for trial and allowed the judge to commit the person to a state hospital on a written statement of the physicians that the accused was insane. Chapter 333 allows the application to be made either before or during trial, not only by the officer in charge of the person but also by anyone acting on his behalf. The act is extended to apply to a person "so mentally defective that he is unable to understand the proceedings against him." The proceeding is more formalized since the judge is required to hold a hearing after notice to the state's attorney and counsel for the accused. Prior to the hearing the judge appoints two or three physicians to examine the accused. They must give a verified written report to the judge and testify at the hearing where the report is put in evidence. The court may then commit the accused to a state institution if it finds him insane or mentally defective. Subsequently, if the manager of the institution believes that the accused is neither insane nor mentally incapable, he must report the fact to the court, which must hold another hearing. Maine, Chapter 29, takes care of the case where there may be no county examiner of the insane in the county, by allowing his duties to be performed by any medical examiner authorized to act within the county.

Study of Law Administration in Federal Courts to Be Continued

ALTHOUGH President Hoover's National Commission on Law Observance and Enforcement has passed out of existence, one of the most important undertakings of the Commission, the national study of law administration in the Federal Courts of the United States, is to be continued under the auspices of the American Law Institute in co-operation with Yale University, according to a statement issued to the Press on February 7th. The present plans call for tabulation, at the Institute of Human Relations of Yale University, of the data collected with a report covering all criminal cases studied, and another covering civil cases.

"Dean Charles E. Clark, of the Yale Law School, Chairman of the study," the statement continues, "said that the project would be completed when the necessary funds are obtained. Mr. George W. Wickersham, Chairman of the National Commission on Law Observance and Enforcement and also President of the American Law Institute, was successful in obtaining an appropriation last spring from one of the Foundations of $25,000 to the Law Institute toward the expense of completing the study. That appropriation was, however, made contingent upon securing a like sum from other sources by December 31, 1932. To date it has not been possible to obtain the other appropriation called for by the gift. A sum of $10,000 of this proposed gift has been released for immediate use in tabulating the data already obtained.

"The project, which began as of October 1, 1930, consists of a study of law administration in the Federal Districts of California, Colorado, Connecticut, Illinois, Kansas, Louisiana, Massachusetts, Michigan, New York, North Carolina, Ohio, and West Virginia, through a scientific analysis of case records, both civil and criminal, in those courts. The general purpose of the study is to test the efficacy of the administration of justice in the Federal Courts. Concrete factual, statistical information is being sought to illustrate and test the working of rules, procedure, and general methods of administering justice. This involves the collection of actual figures bearing on congestion and the types of business entering and being disposed of in the Federal Courts, the time spent by the courts on the various types of litigation, the disposition of criminal cases on 'bargain days,' and aspects of the so-called 'break-downs' in the system. The criminal study covers cases terminated in the last three years. The civil study includes the last fiscal year in most districts, and a longer period in a few. Information is obtained from the files and dockets of the clerks of the courts, and of the district attorneys, and from the transcripts of the commissioners.

"Particular attention is being given to information concerning the time element in the trial of lawsuits. It is thus possible to follow the cases from beginning to end, to determine at what stage most of the litigation is disposed of, what statutes or common law rules impose the greatest burden on the court, the effect of reference to masters and referees in relieving the court of its burdens, the weight given to their conclusions in the main run of cases, and similar questions."

Roll of Honor

MEMBERSHIP CAMPAIGN 1932

[This list contains the names of all members who have sent in membership applications in response to President Thompson's recent letter. It also lists all other members who have sent in applications since the Atlantic City Meeting. Future issues of the JOURNAL will contain a list of those sending in applications since the previous issue.—Editor.]

Arizona

Barry, James D., Tucson.
Hartman, Francis M., Tucson.

Arkansas

Burrow, Lawrence B., Little Rock.
Gray, Clifton W., Little Rock.
Wilson, J. R., Eldorado.

California

Adams, Ida May, Los Angeles.
Barnes, Stanley N., Los Angeles.
Beardsley, Charles A., Oakland.
Bowden, Leslie S., Los Angeles.
Campbell, Kemper, Los Angeles.
Chandler, Jefferson P., Los Angeles.
Craig, Gavin W., Los Angeles.
Cruickshank, Lewis, Los Angeles.
Cushing, Charles S., San Francisco.
Dryer, George W., Los Angeles.
Evans, I. Blair, Pasadena.
Forgy, H. J., Santa Ana.
Haas, Walter F., Los Angeles.
Harrison, Maurice E., San Francisco.
Head, David B., Los Angeles.
Hurtt, John N., Los Angeles.
Kirkbride, Charles N., San Mateo.
Kirkwood, Marion R., Stanford University.
Levinson, Aaron, Los Angeles.
Lewis, John V., Oakland, Calif.
Long, Percy V., San Francisco.
Lyon, Frederick S., Los Angeles.
McGovern, Walter, San Francisco.
McMurray, Orrin K., Berkeley.
Morris, C. B., San Francisco.
O'Connor, J. F. T., Los Angeles.
Shurtleff, Charles A., San Francisco.
Swing, Ralph E., San Bernardino.
Torregano, Ernest J., San Francisco.

Colorado

Adams, John R., Denver.
Blount, G. Dexter, Denver.
Shafroth, Will, Denver.
Storer, Todd C., Pueblo.

Connecticut

Baldwin, Alfred C., Derby.
Barrett, Frank P., Stamford.
Brosmith, Allan E., Hartford.
Clark, Charles E., New Haven.
Hickey, Daniel F. B., Stamford.
Robinson, Thomas R., New Haven.

Delaware

Frame, Thomas C., Dover.

District of Columbia

Brashears, Edward S., Washington.
Cake, Lawrence H., Washington.
Camalier, R. F., Washington.
Douglass, William Boone, Washington.
Flynn, James B., Washington.
Gartner, Karl Knox, Washington.
Hamel, Charles D., Washington.
Hansen, Arnold C., Washington.
Hanson, S. Dee, Washington.
Hendricks, Homer, Washington.
Himmler, Christian F., Washington.
Hoover, George P., Washington.
Houghton, Alfred M., Washington.
Kemon, Lee B., Washington.
Lake, E. C., Washington.
McKenney, Frederic D., Washington.
MacCracken, William P., Jr., Washington.
Miller, Robert N., Washington.
Nyce, Peter Q., Washington.
Robinson, Ira E., Washington.
Saunders, Benjamin H., Washington.
Smith, Stanley Phillips, Washington.
Taggart, Etta L., Washington.
Wheatley, H. Winship, Washington.
Willebrandt, Mabel Walker, Washington.

Florida

Loftin, Scott M., Jacksonville.
Wood, Marshall B., West Palm Beach.

Georgia

Arnold, Reuben R., Atlanta.
Asbill, Mac, Atlanta.
Atkinson, Samuel C., Atlanta.
Boykin, John A., Atlanta.
Chalmers, Franklin S., Atlanta.
Troutman, Robert B., Atlanta.
Tye, John L., Jr., Atlanta.

Hawaii

Robertson, A. G. M., Honolulu.

Idaho

Ailshie, James F., Coeur d'Alene.
Goff, Abe, Moscow.

Illinois

Ahlberg, Albin C., Chicago.
Albertsworth, E. F., Chicago.
Alden, William Tracy, Chicago.
Barthell, Edward East, Chicago.
Bausch, William Carl, Chicago.
Becker, Louis L., Chicago.
Bentley, Richard, Chicago.
Bishop, Joseph L., Zion.
Bogert, George G., Chicago.
Busch, Francis X., Chicago.
Carpenter, W. E., Rockford.
Chamberlain, William, Chicago.
Chapman, Theodore S., Chicago.
Clark, Charles V., Chicago.
Cooney, Richard J., Chicago.
Denning, Clarence P., Chicago.
Elvis, Peter C., Chicago.
Everett, Edward W., Chicago.
Gorham, Sidney S., Chicago.
Griswold, E. V., Chicago.
Harding, Charles F., Jr., Chicago.
Harrington, Joseph T., Chicago.
Hills, Charles W., Jr., Chicago.
Hoffman, Richard Yates, Chicago.
Hogan, John E., Taylorville.
Hubachek, F. B., Chicago.
Humphrey, Thomas K., Chicago.
Jersild, Marvin A., Chicago.
Kaplan, Jacob, Chicago.
Lindsay, William J., Chicago.
Liss, Max C., Chicago.
Millar, Robert Wyness, Chicago.
Oates, James F., Jr., Chicago.
Packard, George, Chicago.
Peden, Thomas J., Chicago.
Robinson, Warner H., Chicago.
Stephens, R. Allan, Springfield.

Indiana

Barrett, James M., Jr., Fort Wayne.
Batton, Robert R., Marion.
Blair, Russell, Terre Haute.
Bingham, James E., Indianapolis.
Buenting, L. D., Indianapolis.
Clapham, William E., Fort Wayne.
Curtis, Harvey J., Indianapolis, Ind.
Davidson, Robert F., Indianapolis, Ind.
Longfellow, Homer, Warsaw.
Morris, John, Fort Wayne.
Robinson, J. J., Bloomington.

Iowa

Brunk, Gregory, Des Moines.
Hunn, H. S., Des Moines.
Miller, Jesse A., Des Moines.
Ottesen, Realff, Davenport.

Kansas

Bennett, Edgar C., Marysville.
Berger, Albert L., Kansas City.
Bryant, C. J., Independence.
Webb, Robert L., Topeka.

Kentucky

Brent, George A., Louisville.

Louisiana

Arnold, William H., Jr., Shreveport.
Cabral, Harry R., New Orleans.
Harris, Rufus C., New Orleans.
Irion, Val, Shreveport.
Levy, Leonard B., New Orleans.
Wolff, Justin V., New Orleans.

Maine

Gould, Daniel I., Bangor.
Hutchinson, Charles L., Portland.

Maryland

Bartlett, J. Kemp, Baltimore.
Carter, James T., Baltimore.
Howell, Roger, Baltimore.

Massachusetts

Bahn, Coleman T., Boston.
Bailey, Hollis R., Boston.
Barnet, Samuel, New Bedford.
Beckford, George P., Boston.
Beerman, Bernard, Boston.
Benton, Jay R., Boston.
Carlton, Otis, J., Haverhill.
Carney, Francis J., Boston.

Dooley, Dennis A., Boston.
Ehrlich, Harry M., Springfield.
Hoar, Samuel, Boston.
Hubbard, Paul M., Boston.
O'Connell, Joseph F., Boston.
Richmond, Harris M., Boston.

Michigan

Abbott, A. George, Detroit.
Birge, Guy A., Detroit.
Braun, Edgar G., Detroit.
Butler, W. V., Detroit.
Cohane, Louis S., Detroit.
Eaman, Frank D., Detroit.
Essery, Carl V., Detroit.
Essery, William E., Detroit.
Fox, Charles R., Detroit.
Kelley, Dean W., Lansing.
Stason, E. Blythe, Ann Arbor.
Wilson, J. Frank, Huron.

Minnesota

Caldwell, Chester L., St. Paul.
Field, N. F., Fergus Falls.
Nelson, Arthur E., St. Paul.

Mississippi

Welch, W. S., Laurel.

Missouri

Arnold, Mercer, Joplin.
Bour, J. Coy, Columbia.
Britton, Roy F., St. Louis.
Chivvis, Ada M., St. Louis.
Ellison, Edward D., Kansas City.
Ess, Henry N., Kansas City.
Freund, Arthur J., St. Louis.
Fry, W. Wallace, Mexico.
Hecker, Harold P., St. Louis.
Jones, William T., St. Louis.
Kinealy, William B., St. Louis.
Levinson, Adrian M., St. Louis.
Logan, George B., St. Louis.
Lowenhaupt, Abraham, St. Louis.
Parks, J. L., Columbia.
Rhodes, John F., Kansas City.
Thompson, Guy A., St. Louis.
Mohr, Frank A., St. Louis.

Montana

Patten, George Y., Bozeman.
Pomeroy, Charles W., Kalispell.
Whitlock, Albert N., Missoula.

Nebraska

Anderson, Walter L., Lincoln.
Davis, Clarence A., Holdrege.
Eldred, Charles E., McCook.
Letton, Charles B., Lincoln.

Nevada

Cheney, Everett W., Reno.
Cohn, Felice, Reno.

New Jersey

Backes, H. W., Trenton.
Beach, George R., Jersey City.
Benjamin, Frank, Newark.
Boyle, William T., Camden.
Dey, Orlando H., Rahway.
Egner, Arthur F., Newark.
Harrison, J. Henry, Newark.
Katzenbach, Edward L., Trenton.
Lafferty, Francis, Newark.
Lum, Ralph E., Newark.
McLean, Donald H., Elizabeth.
Minard, Duane E., Newark.
Richards, Samuel H., Camden.
Scheck, Emanuel P., Newark.
Shepard, Fred E., Elizabeth.
Smith, Benjamin B., Asbury Park.
Steedle, Robert E., Atlantic City.
Sullivan, Stephen K., Jr., Hoboken.
Tiffany, J. Raymond, Hoboken.
Wainright, Halsted H., Manasquan.

New Mexico

Hurlburt, Helen A., Albuquerque.
Wilson, Percy, Silver City.

New York

Allen, Frederick L., New York City.
Anderton, Stephen P., New York City.
Applebaum, Julius, Brooklyn.
Baldwin, Sherman, New York City.
Ballard, William R., New York City.
Bechtel, Edwin De T., New York City.
Belknap, Chauncey, New York City.
Benedict, Abraham, New York City.
Boston, Charles A., New York City.
Boston, Lyon, New York City.
Buland, George L., New York City.
Burkan, Nathan, New York City.
Cardozo, Michael H., Jr., New York City.
Carroll, Philip A., New York City.
Coulson, Robert E., New York City.
Crispell, Reuben Bernard, New York City.
Cumpston, Edward H., Rochester.
Edmonds, Dean S., New York City.
Ernst, Irving L., New York City.
Evens, Jules G., New York City.
French, Harry N., New York City.
Frumberg, A. M., New York City.
Fybush, Aaron, Buffalo.
Galli, Louis P., New York City.
Garey, Eugene L., New York City.
Garvin, Edwin L., New York City.
Grover, Harry G., New York City.
Hartung, Albert M., New York City.
Hirsch, Hugo, New York City.
Intemann, Alfred C., New York City.
Jackson, John G., New York City.
Neave, Charles, New York City.
Neuendorffer, R. C., New York City.
Phillips, N. Taylor, New York City.
Ransom, William L., New York City.
Rich, G. Willard, New York City.
Seligsberg, Walter N., New York City.
Sutherland, Arthur E., Rochester.
Vought, Grandin T., Jr., New York City.
Walton, Charles W., Albany.

North Carolina

Andrews, Alexander B., Raleigh.
Van Winkle, Kingsland, Asheville.

North Dakota

Hall, Jerome, Grand Forks.
Hildreth, Melvin A., Fargo.

Ohio

Avery, Willis F., Akron.
Alvord, George W., Painesville.
Andrews, John D., Hamilton.
Baldwin, William Edward, Cleveland.
Bentley, H. O., Lima.
Butler, James A., Cleveland.
Carter, Henry W., Toledo.
Chalfant, Harry B., Steubenville.
Fisher, Frank H., Youngstown.
Gottwald, Donald, Akron.
Heidingsfeld, Ben L., Cincinnati.
Lorman, Albert C., Cleveland.
Pogue, Province M., Cincinnati.
Shook, Chester R., Cincinnati.
Stern, Joseph L., Cleveland.
Zielonka, Saul, Cincinnati.

Oklahoma

Arrington, John L., Pawhuska.
Bond, Reford, Chickasha.
Calvert, Floyd A., Tulsa.
Duvall, Felix C., Ponca City.
Erwin, Walter C., Chandler.
Falkenstine, Allan, Watonga.
Keaton, J. R., Oklahoma City.

Oregon

Calkins, S. M., Eugene.
Teiser, Sidney, Portland.

Pennsylvania

Acheson, M. W., Jr., Pittsburgh.
Ames, J. Wilson, Honesdale.
Arnold, Arthur S., Philadelphia.
Ashton, Chester H., Knoxville.
Baird, Harry Alvan, Williamsport.
Brockway, Chauncey E., Sharon.
Buchanan, John G., Pittsburgh.
Childs, Randolph W., Philadelphia.
Comegys, Cornelius, Scranton.
Conwell, Joseph S., Mt. Airy.
Costello, James P., Jr., Philadelphia.
Creamer, William H., Jr., Philadelphia.
Croasdale, John P., Philadelphia.
Fertig, John H., Harrisburg.
Foulke, Thomas A., Ambler.
Henderson, Joseph W., Philadelphia.
Huey, Arthur B., Philadelphia.
Hurlock, W. S. T., Jr., Harrisburg.
Keller, William H., Lancaster.
Levinthal, Louis E., Philadelphia.
McKaig, Edgar S., Philadelphia.
Maxwell, Charles P., Easton.
Moorhead, Forest G., Beaver.
Obermayer, Leon J., Philadelphia.
Williams, J. Ambler, Norristown.

Rhode Island

Bowen, William M. P., Providence.
Canning, John E., Providence.
Canning, Joseph P., Providence.

South Carolina

Bowen, W. E., Greenville.
Lide, L. D., Marion.
Young, Arthur R., Charleston.

South Dakota

Bottum, Roswell, Sioux Falls.
Gardner, Archibald K., Huron.
Voorhees, John H., Sioux Falls.

Tennessee

Ewing, Andrew, Nashville.
Kefauver, Estes, Chattanooga.
Smith, Charles H., Knoxville.

Texas

Atwell, William H., Dallas.
Aubrey, William, San Antonio.
Ayres, Jeff D., Floydada.
Butler, Charles T., Beaumont.
Flowers, Allen G., Waco.
Frank, D. A., Dallas.
Huff, Charles C., Dallas.
Simmons, David Andrew, Houston.

Utah

Ritter, Willis W., Salt Lake City.

Vermont

Ashland, Ezekiel A., Burlington.
Barber, Norton, Bennington.
Trainor, Raymond, White River Junction.

Virginia

Eager, George B., Jr., University.
Eggleston, John S., Richmond.
Gary, J. Vaughan, Richmond.
Harper, Fred, Lynchburg.
Lenahan, James R., Richmond.
McGuire, O. R., Clarendon.

Washington

Allen, William M., Seattle.

West Virginia

Bias, Randolph, Williamson.
Blair, J. V., Jr., Fairmont.
Fitzpatrick, Herbert, Huntington.
Flesher, C. W., Gassaway.
Francis, James D., Huntington.
French, Hoagland, Welch.
Strother, D. J. F., Welch.

Wisconsin

Braathen, Sverre O., Madison.
Hollister, R. A., Oshkosh.
Lecher, Louis A., Milwaukee.

Wyoming

Barrett, Frank A., Lusk.

LETTERS OF INTEREST TO THE PROFESSION

Editor, AMERICAN BAR ASSOCIATION JOURNAL:

IN the December number of the Journal of the American Bar Association, Judge Evans, of the Seventh Circuit Court of Appeals, reviews the six volume record in the Sacco-Vanzetti case (Holt and Company), published in 1928 (hereafter called "Record"), and Mr. Osmond K. Fraenkel's recent book, *The Sacco-Vanzetti Case*. Judge Evans rightly indicates that a critical judgment upon the Sacco-Vanzetti affair must ultimately rest upon the Record:

"Any individual who wishes 'to ascertain whether "justice was done"' in this case may study this record—read every word of the testimony, every ruling of the court, most of the arguments of counsel, as well as the facts set forth by way of affidavits, upon which the numerous motions to secure a new trial were based."

Mr. Fraenkel purports to base his study upon the Record. And because Judge Evans finds that Mr. Fraenkel's book is not supported by the Record he characterizes it, in effect, "a partisan effort based on the editor's belief in the innocence of the accused or the unfairness of the trial" and "an advocate's statement of the record which favorably presents the points upon which the accused relied for a reversal of the judgment." In support of this condemnation of the Fraenkel book Judge Evans cites "a single illustration," presumably illustrative, namely, the following "statement of facts on page 13" of Fraenkel's introductory chapter, "A Brief Survey":

"Sacco when arrested had a .32 Colt pistol and thirty-two cartridges of various makes; Vanzetti, a .38 Harrington & Richardson revolver with no extra cartridges, but he had a number of shotgun shells in his possession. At the time of the trial Vanzetti said he had purchased his gun a few months earlier as a protection against hold-ups. Sacco had owned his pistol for several years."

This quotation from Fraenkel is employed by Judge Evans as a test of reliability, and upon it he condemns Fraenkel for unfairness and partisanship.

Let us then take the statements of Judge Evans in condemnation of Fraenkel and submit both Judge Evans and Mr. Fraenkel to the test of the Record.

Judge Evans' Statement

[1] "The possession of shotgun shells in and of itself gave rise to no inference of criminality. The record showed however that the Buick car which carried the murderers to South Braintree had, sticking through the back window, a sawed-off shotgun."

The Facts

There is no evidence to support the statement that the Buick car carried "a sawed-off shotgun." The several witnesses for the prosecution called it "a rifle sticking out of the back end" (R., 269), "a long-barreled gun probably a couple of feet long" (R., 284) and "something sticking through" the back window of the Buick (R., 544). Only one witness used the term "shotgun" with which to describe his uncertainty as to the kind of a gun it was—"there was some one in the back there beckoning with a gun or shotgun, whatever it was, . . ." (R., 328)—and he further testified that "it was sticking out quite a bit" (R., 328).

While Mr. Fraenkel does not on page 13 refer to the weapon protruding from the back of the Buick, the circumstances are set out by Fraenkel on pages 40, 122 and 177.

Judge Evans' Statement

[2] "Vanzetti claimed that he had shotgun shells because occasionally he went out into the country for a stroll or a walk, and sometimes he shot birds."

The Facts

Vanzetti made no such explanation. Vanzetti testified that he got the shells at the Saccos when the latter were packing to go to Italy, and that he took them to give to friends in Plymouth who hunted in the wintertime (R., 1714-15). In this he was corroborated by Mrs. Sacco. But Judge Thayer, in his decision denying the so-called Madeiros motion for a new trial, stated that Vanzetti "testified he understood they were to be used for small birds; and yet, when these cartridges were opened at some time during the trial it was found that they contained buckshot" (R., 4737).

Judge Evans puts his authority behind this statement of Judge Thayer's, although for more than four years it has been a matter of record that Vanzetti never made this statement attributed to him by Judge Thayer. Indeed, Judge Evans now adds to what must be regarded as Judge Thayer's improvisation, unfounded in the Record, by making Vanzetti say, what he never said, that "sometimes he shot birds."

Judge Evans' Statement

[3] "The shotgun shells found on his person were loaded with buckshot which is more commonly used by bandits in sawed-off shotguns than by pedestrians walking through the country and shooting birds."

The Facts

At the trial of Sacco and Vanzetti there was no testimony that buckshot was fired by anyone, or that "the shotgun shells found on his [Vanzetti's] person were loaded with buckshot." It is true that in the cross examination of Sacco the District Attorney assumed that they were so loaded and used the word "buckshot" (R., 1894-95). Nor was there evidence at the earlier trial of Vanzetti, at Bridgewater, for attempted highway robbery, that anyone had fired buckshot. The evidence merely was that one of the bandits in the Bridgewater hold-up had fired a shotgun (R., supp. vol. 47).

It is true that the jury in the Bridgewater case secretly and without authority opened two shells produced by the police and purporting to come from Vanzetti's possession. These shells contained buckshot. Counsel for the defense never had an opportunity to meet the issue raised by these shells.

The failure to identify the shells as coming from Vanzetti, except that "they look like the same ones," the absence of any claim by the Commonwealth during the public trial of the Bridgewater case that the shells contained buckshot, the suspicious circumstances attending the shells themselves and the doubtful police procedure in the whole case, are set forth at length in a letter which counsel for the men addressed to the Governor and about which Judge Evans is wholly silent. (R., supp. vol. 352 *et seq.*).

Judge Evans' Statement

[4] "Likewise, no statement is made of the fact that the accused both denied having revolvers in their possession when arrested or that Vanzetti falsely stated the place and time when he secured his revolver."

The Facts

Here again, Judge Evans relies for his allegations not upon the official record, but upon apocryphal remarks of Judge Thayer. For while Judge Thayer attributes to both defendants the denial of having revolvers (R., 4763), the testimony shows that Sacco alone made such denial (R., 753). While Fraenkel does not refer to this on page 13, he sets out the testimony in question *verbatim* on page 414.

Again, Vanzetti's lies regarding his revolver are dealt with *in extenso* in Fraenkel's book on pages 110, 390 *et seq.*, 423, 462, 470-71. Judge Evans thus charges Fraenkel with partiality for failure on a particular page in an introductory summary to refer to an item of evidence which, in other places, he repeats five times and at some length.

Judge Evans' Statement

[5] "Nor at this place was it stated that the revolver found in Vanzetti's possession was of the same make and of the same calibre as the revolver that had been taken from the deceased guard by the murderer immediately after his killing."

The Facts

Nor does Judge Evans state that while Fraenkel does not set out this allegation on page 13 of his book, he does set it out, *so far as it comports with the record*, on pages 57, 80, 86, 87, 101, 112, 121, 175, 177, 471. A whole chapter (pp. 390-405) is given to its discussion.

There is no warrant in the testimony for saying, as Judge Evans does, that a "revolver had been taken from the deceased guard by the murderer." No witness testified either that Berardelli [the guard] had a revolver on the day of the crime, or that any of the bandits was seen doing anything which might suggest that he was taking away a revolver. The jury was merely asked to draw such an inference from the fact that no weapon was found on Berardelli and from the testimony of a witness, looking through a factory window, that he saw a bandit with a "white gun" or "revolver" (R., 1157, 1152). The witness, however, was not shown Vanzetti's gun. From this

testimony the District Attorney argued that as the shots had been fired from an automatic this "white gun" must have been Berardelli's (R., 2184). The claim was that the revolver taken from Vanzetti upon his arrest, about three weeks after the crime, was the revolver that had been owned by Berardelli and that had been left by him, some time before his death, at Iver Johnson's gunshop for repairs. The claim rested only on the similarity in the calibre and make, and not on any identifying mark. Judge Evans fails to state that one of the employees of Iver Johnson, whose testimony was relied upon for the Commonwealth's claim at the trial, later appeared before the Governor's Advisory Committee and testified as follows:

"Q. What is your belief today, judging from your records and all that you have personal knowledge of, what is your belief as to whether that was or was not Berardelli's pistol? A. Well, there are thousands of times more chances that it was not than that it was, because there is only one, and just that one pistol, and there are just as many other chances as they had made pistols before that time—I don't know how long they have been in business, but probably thirty or forty years—that it was not." (R., 5235).

Judge Evans reviewed Fraenkel's book against the Record. But the Record compels the conclusion, not that Fraenkel did not adequately abstract the Record, but that Judge Evans did not adequately digest either the Record or Fraenkel's book.

FELIX FRANKFURTER.

December 21, 1931.

NEWS OF STATE AND LOCAL BAR ASSOCIATIONS

Nebraska

Nebraska State Bar Association Holds Thirty-Second Annual Meeting—President Guy A. Thompson Delivers Address

The two principal speakers at the annual meeting of the Nebraska State Bar Association, held at Omaha, on December 29-30, 1931, were Hon. Guy A. Thompson, president of the American Bar Association, and Hon. Edward J. White, vice-president and general solicitor of the Missouri Pacific Railroad Company. The president's address, by Hon. Fred Shepherd, was delivered at the opening session on the subject "The Grim Condition."

Recommendations by the Committee on Legal Education that no attorney be permitted to register more than two law students in his office, during a three year period, for purposes of qualifying to take the examinations for admission to the bar, and that any such preceptor must himself have been engaged in the active practice of law for at least five years were approved by the Association.

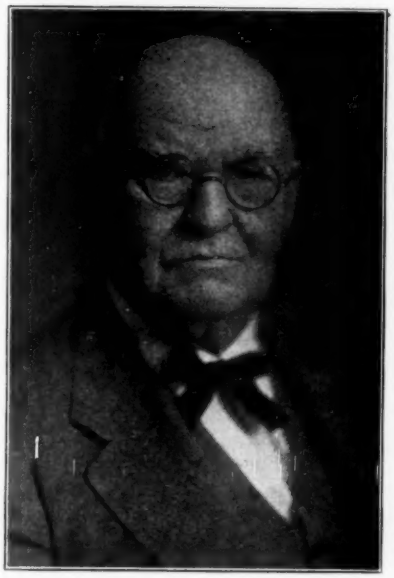
A Special Committee on the Jury System submitted a report recommending that the general verdict in all civil cases be abolished and that the jury be permitted only to make special findings on controverted issues of ultimate fact. The report was passed over for action by the Association at its next annual meeting.

Professors William Sternberg, of Creighton University, and Maurice Merrill, of the University of Nebraska, were awarded an honorarium, in appreciation of their efforts in connection with the annotation of the Restatement of the Law of Agency and the Restatement of the Law of Contracts with Nebraska cases.

The Committee on Unauthorized Practice of Law requested that it be given a further year's time in which to submit a special report on this important subject.

The 32nd Annual dinner of the Association was held in the evening of December 30th. The retiring president, Fred Shepherd, served as toastmaster, and responses were made by James G. Mothersead of Scottsbluff, Charles McLaughlin of Omaha, E. B. Perry of Lincoln, H. H. Wilson of Lincoln, and B. S. Baker of Omaha, the president-elect. Mr. Wilson's subject was "The Evolution of the World Court."

Approximately 500 lawyers attended the meeting. The following officers were elected for 1932: President, B. S. Baker; Vice-presidents, B. O. Hostetler, Kearney, Jackson B. Chase, Omaha, F. H. Pollock, Stanton; Secretary, Harvey Johnsen, Omaha; Treasurer, Virgil J. Haggart, Omaha; Member of Executive Council, Richard F. Stout, Lincoln.



HON. B. S. BAKER
President, Nebraska Bar Association

New York

New York State Bar Holds Annual Meeting

Judge Samuel Seabury was elected President of the New York State Bar Association at the meeting held in New York City on January 21, 22 and 23. He succeeded Judge Frank H. Hiscock, who ended a service of three years, during which the Association made rapid strides both in membership and accomplishments, according to the *New York State Bar Association Bulletin*.

Hon. Charles W. Walton was re-elected secretary and Harry M. Ingram, treasurer. The vice-presidents for the year include John Godfrey Saxe of New York, James C. Van Sielen of Jamaica, Joseph Rosch of Albany, Fred Linus Carroll of Johnston, George H. Bond of Syracuse, Leon C. Rhodes of Binghamton, Eugene Raines of Rochester, Evan Hollister of Buffalo and George H. Taylor, Jr. of Mount Vernon. The meeting was conducted January 21, 22 and 23 in the quarters of the Association of the Bar of the City of New York, 42 West 44th Street, New York City.

President Hiscock called the Association to order in the meeting room of the Association of the Bar of the City of New York. After certain details of the regular order of business had been disposed of he delivered the presidential address, which was largely devoted to the accomplishments of the Association during the past years. After enumerating a number of important services rendered, he said:

"But perhaps I may say without criticism that the outstanding accomplishment of the year, in my opinion, has been the part which the Association has taken in effecting the organization of the Commission to study the Administration of the Law and the part which it is taking through its representatives in the work of that Commission.

"I do not think it is saying too much to state that this Association through its officers took a leading part in effecting the organization of that body. For two years attempts to organize it had broken down through causes not necessary here to recapitulate. Last winter through the initiative of representatives of this Association, conflicting ideas were reconciled, the Commission was organized and for the first time so far as I know this Association was given specific representation in a body created to discharge such a duty as is delegated to this Commission. That Commission is at work. One of our members, Judge Daniel J. Kenefick, is Chairman of its Executive Committee.

"In my opinion great opportunities lie before it for surveying, revising and improving the administration of the law in this State. Its labors, if wisely performed, will not be completed in the short time specified in the Act creating it but will extend through several years and the guiding principle of those labors, let us hope, will be to adopt and

recommend changes which will commend themselves to the great body of our profession as practical improvements, and not be tinged by too much theory or too drastic features which will not pass the test of general approval. This Commission has the great advantage that in addition to law professors, lawyers and laymen, legislators are members of it, giving some assurance that its recommendations will receive approval in the Legislature where not infrequently proposed changes in the administration of the law have met with disapproval and defeat. To adopt the idea of another recent statement of Chief Justice Hughes, the great requirement of the present day is that through such bodies as this we should discover and catalogue the defects in our administration of the law and then in a practical and efficient way, without seeking to accomplish the impossible, find and put into effect practical specifics by which to remedy those defects."

After the above order of business had been completed, according to the ***Bulletin,*** the Association adjourned until Friday morning, and a meeting of the Presidents of the Federations of the Bar, Committees on Character and Fitness, and Presidents of local Bar Associations was held. An interesting program was provided. The meeting was addressed by William D. Guthrie, former President of the Association, Evan Hollister, Buffalo, a member of the Committee on Character and Fitness for the Fourth Department, and by Robert T. McCracken of the Philadelphia Bar. This meeting was presided over by Rollin W. Meeker, Binghamton, who was elected Chairman at the last meeting of this group.

The session Friday morning was devoted to reports of various committees. Friday afternoon, after several more committee reports, Hon. Martin Conboy presented a paper on "Trial by Jury," which was followed by a discussion by representatives of the several Judicial Districts. Friday evening there was an address by Hon. Benjamin N. Cardozo on "The Judicial Process up to Now."

Saturday morning there was a paper by Hon. Danel J. Kenefick, Chairman of the Executive Committee of the Commission on the Administration of Justice; a paper on "Judicial Councils," by William C. Breed; and a paper on "Legal Aid Organizations," by John V. Bradway. At the annual dinner, which was served at the Hotel Astor, addresses were delivered by Solicitor General Thomas D. Thacher, Hon. George Wharton Pepper and Dr. John H. Finley.

The session of the Judicial Section convened Saturday morning at ten thirty in the rooms of the Association of the Bar of the City of New York. Justice Robert F. Thompson, Chairman of the Section, presided. In addition to the election of officers and the transaction of other business, an interesting program was carried out which included an informal talk by former Presiding Justice Victor J. Dowling. The meeting was followed by luncheon at the Hotel Astor at which Chief Judge Cardozo presided, and informal talks were given by the Hon. Albert C. Ritchie, Governor of Maryland, and the Hon. John J. Bennett, Attorney General of the State of New York.

HON. SAMUEL SEABURY
President, New York State Bar Association

Ohio

Ohio State Bar Deals With Unlawful Practice of Law and Other Important Questions at Mid-Winter Meeting—Gov. Ritchie and President Thompson Speak at Banquet

The Ohio State Bar Association, at its mid-winter meeting held in Cincinnati on January 28, 29 and 30, disposed of a number of important matters presented to it in reports of committees, heard a number of interesting addresses, acted on several proposals for amendment of the constitution of the organization, and empowered other committees to continue work and report conclusions at the regular annual meeting this year.

Among the reports adopted was that of the Committee on the Unauthorized Practice of Law. The detailed account of the meeting in the *Ohio Bar Association Report* (Feb. 2) says of it: "The report of the Supervising Committee on Unauthorized Practice of Law, through Chairman Robert F. Guinther of Akron, detailed its activities during the year and recommended that suits begun by local associations or individuals to test the question of unauthorized practice of law be conducted by such associations or individuals, that the State Bar Association extend aid in the way of furnishing briefs and arguments in such cases, that efforts be made to secure by consent decree or otherwise, agreements with banks and trust companies as to the practice of the law, that local Associations endeavor to compel collection and similar agencies to discontinue the use of forms simulating court forms and the solicitation of business for attorneys, and that efforts be made to expose misrepresentations by automobile service associations with reference to insurance and legal services provided by them. The report was adopted."

It adds, in this connection, that "Joseph L. Stern of Cleveland, Chairman of the Cuyahoga County Bar Association Committee on the Practice of the Law, reported the progress made by that Association in curbing the unauthorized practice of law by individuals and corporations in the City of Cleveland, detailing the results obtained by the action of that Committee, in which 23 injunctions were obtained, five cases are still pending in the Common Pleas Court of Cuyahoga County awaiting trial, and three cases pending in the Court of Appeals of Cuyahoga County. These actions were brought against Associations with a total membership in excess of 80,000 and a total income in excess of $2,000,000 annually. A vote of thanks was extended to Mr. Stern and his Committee."

In approving the recommendations of the committee on the Industrial Commission, presented by Chairman Harold F. Adams of Columbus, the Association expressed its disapproval of certain Rules of that Commission regarding practice before it, viz: That attorneys may be suspended by the Commission from practice before the Commission; that laymen may practice before the Commission; that attorneys be required to register before the Commission as a requisite to practice; that attorneys shall file copies of fee contracts; that the Commission may fix the amount of fees charged clients by attorneys; and that copies of medical reports shall not be furnished parties or their counsel before the date of hearing. "The recommendations of the committee," we are told, "were adopted and the Commission was requested to limit the practice before it to lawyers."

The report of the Committee on Legal Education was presented by Chairman Grauman Marks of Cincinnati. "The report," we are told, "outlined the work done by the committee in the consideration given to the efficiency of bar examinations as they are now conducted in this state, calling particular attention to the surprising variance in percentage of failures shown in different examinations. The Committee recommended that all questions should be based on general legal principles, that they should stay within the general principles of the subject in which they are asked, and that the number asked should be reduced from 100 to 75, and suggested that to accomplish the latter recommendation, the number of subjects might be reduced, omitting suretyship, partnership and bailments. It was further recommended that more credit should be given to reasoning than to the result reached by the students as to a particular question, and that the examiners should endeavor to reach a middle ground in the marking or grading of papers.

"The report of the Committee was received, and the recommendations of the Cincinnati Bar Association that after an applicant had failed three times in the State Bar examination, he should not be eligible for another until he had given satisfactory evidence of having diligently pursued a prescribed course of further study, and that Section 1703, General Code, (the five year practice act), be so amended as to prevent admission of applicants from states with low educational and other standards of admission, who practice for five years for the sole purpose of gaining admission to the Ohio Bar without examination, were adopted."

Former President Province M. Pogue

of Cincinnati, presented a report outlining the work of the committee on Corporation Law and Blue Sky Law in considering proposed amendments to those laws, and also recommending greater coordination among the different committees of the Association and a very complete and careful consideration of all proposed changes. The recommendation was adopted.

Dean Merton L. Ferson of the Cincinnati Law School, reporting for the chairman of the committee on the American Law Institute, said that the committee is continuing the work of the annotation of the Ohio cases to the restatement of Conflict of Laws, Trusts, Torts and Contracts.

Chairman John M. Vorys, of the committee on Aviation, stated that the action of the Legislature last year had given the State an up-to-date system for regulating and licensing aircraft and pilots. However he said that the committee is considering certain legislation controlling the use of aircraft in the State and is giving particular attention to the necessity of making such legislation uniform with federal legislation on the subject. The committee was continued for further study and report. Further time for consideration was given other important committees reporting at this meeting.

The proposed constitutional amendment adding to the "Object" of the Association in Article II the words, "To preserve and protect the privileges and rights of the lawyers and the liberties and rights of the people," was rejected, as was also another providing for compensation of the President, to be fixed by the Executive Committee.

The meeting was called to order by President Walter A. Ryan of Cincinnati. The invocation was offered by Rev. Hugo F. Sloctemeyer S. J., President of St. Xavier University, Cincinnati, after which the Association unanimously adopted a resolution in memory of the late Judge James E. Robinson of the Supreme Court, offered by Mr. Province M. Pogue. The address of welcome, on behalf of the Bar and citizens of Cincinnati, was delivered by Hon. John H. Druffel, Vice Mayor of the City of Cincinnati. The response on behalf of the Ohio State Bar Association, was made by Former Supreme Court Judge Joseph W. O'Hara, President of the Cincinnati Bar Association.

President Ryan then delivered a brief address. He "expressed to the members of the Association his deep appreciation of the opportunity to serve them as its president during the year, and detailed briefly some of the things attempted during the first six months of his administration, among them the work of the Committee on the Unauthorized Practice of Law, the work of the Cuyahoga Bar Association on the same subject, the progress being made by the Committee appointed to draft a uniform Municipal Court Code, and some of the matters being considered by the Committee on Aviation Law. Judge Ryan opposed vigorously the adoption of the proposed amendments to the Constitution of the Ohio State Bar Association, providing for the insertion of the words, 'to preserve and protect the privileges and rights of the lawyers and the liberties and rights of the people,' in the object article of the Constitution, and the proposed amendments, adding to the duties assigned to the president, and providing that the officers of the Association, other than the Secretary-Treasurer, shall be compensated for their services, expressing the hope that such amendments would fail."

Other addresses made during the main sessions were by Mr. Carlton S. Dargush of Columbus, Special Counsel to the Tax Commission of Ohio, who spoke on "Inheritance Tax Laws"; Attorney General Gilbert Bettman, whose subject was "Just Carrying On;" and by Hon. Hugh L. Nichols, former Chief Justice of the Supreme Court, who paid a tribute to the late Justice James E. Robinson. Hon. Howard L. Bevis, Director of Finance of the State, addressed the Judicial Section on the financial System of the State and the steps being taken to deal with present problems, and Hon. Harry F. Payer, President of the Cuyahoga Bar Association, spoke to the Conference of Bar Association Delegates on "The Practice of the Law —the Lawyer's Prerogative."

At the annual banquet the first address of the evening was made by Hon. Guy A. Thompson of St. Louis, President of the American Bar Association. His address was devoted to a review of the work of the American Bar Association and ways in which the effectiveness of the work of that Association may be improved, all to the end that the practice of the law may occupy the high plane which should be occupied by all the learned professions. Hon. Albert C. Ritchie of Annapolis, Governor of Maryland also delivered an address, which was an exhortation to the members of the Bar to have faith in our government and the principles upon which it is founded.

During the meeting the Ohio members of the American Bar Association in attendance got together and endorsed Mr. Province M. Pogue of Cincinnati, for President, subject to the approval of the American Bar Association's General Council. The Association itself later took action joining in this endorsement of Mr. Pogue.

The Common Pleas Judges Association met at Cincinnati, Friday, January 29th, 1932, during the Mid-Winter meeting, and elected the following officers: President, Lester Cecil, Dayton; First Vice-President, A. W. Overmyer, Fremont; Second Vice-President, Geo. B. Harris, Cleveland; Treasurer, N. H. McClure, Medina; and Secretary, H. M. Whitchaft, Logan.

The Judges Association approved a proposal to amend the new Jury Law by making it more flexible in its application to the smaller counties, in making optional the requirements for drawing new juries.

Oklahoma

Oklahoma State Bar Holds Meeting at Tulsa

Despite the "depression" some 850 lawyers were in attendance at the Second annual meeting of the State Bar of Oklahoma which was held at Tulsa, December 29 and 30. This made it one of the best attended meetings ever held in Oklahoma.

The morning session of the first day was given over to the address of welcome and the response; the President's annual address, by Hon. Alger Melton of Chickasha; the report of the Board of Governors of the State Bar, by Charles A. Dickson of Okmulgee, member of the Board of Governors; an address on "The Supreme Court," by the Hon. E. F. Lester, Chief Justice, in which he explained how the Supreme Court was actually catching up with their docket which had been behind for so many years; and the report of the Committee on State Bar examiners, by Sam L. Wilhite of Anadarko.

At one o'clock on the same day, those in attendance gathered in the various district luncheons, which were presided over by the respective Governors. A short program was had by each group and a general round table discussion of the problems confronting the lawyers in their respective districts.

In the evening of the 29th the principal address of the meeting was given by the Honorable George T. McDermott of Topeka, Kansas, Judge of the Tenth U. S. Circuit Court of Appeals. He talked on the State Bar of Oklahoma and its great opportunities for service to the bench, bar and layman. He scored the delays of the Courts, caused not only by the lawyers but by the judges, and pointed out that unless the bench and bar did something immediately the legal profession was doomed, as modern business could not and would not put up with the delays now so prevalent.

On the morning of the 30th, the Hon. Frank M. Bailey of Chickasha addressed the assembly on "Some Phases of Martial Law," referring particularly to the recent use of the militia in Oklahoma, Texas and Louisiana, when the civil authorities had not failed to function and at a time when there did not exist a riot or rebellion. He maintained that legally the military could only assist the Courts and never supplant them in a free country. This was followed by committee reports and an address by

Wilbur J. Holleman on "English Courts, Their Formality and Speed." Mr. Holleman told how the English Courts had years ago abandoned the system which we are using and so speeded up their Courts, adding that no one ever complains of delays in England now.

At noon of the 30th, a meeting of the newly elected Board of Governors was held and the following officers for the year 1932 were selected: President, W. E. Utterback, Durant; Vice-presidents, Edgar A. de Meules of Tulsa, Charles A. Dickson of Okmulgee and F. B. H. Spellman of Alva (who also acts as Editor of the State Bar Journal); Treasurer, C. B. Holtzendorff, Claremore; Secretary, A. W. Rigsby, Oklahoma City.

Members of Board, C. B. Cochran, Oklahoma City; T. M. Robinson, Altus; T. J. Horsley, Wewoka; Allen Wright, McAlester; Lloyd A. Rowland, Bartlesville; Karl Kruse, Enid; H. C. Potterf, Ardmore; Alger Melton of Chickasha.

It is the plan of the State Bar to devote a great deal of time during the year to speeding up justice and preparing recommendations to the 1933 legislature.

The executive committee will name the 1932 meeting place at a later date.

F. B. H. SPELLMAN.

HON. W. E. UTTERBACK
President, State Bar of Oklahoma

Miscellaneous

At the meeting of the New Orleans Bar Association on January 29th, 1932, Professor Francis H. Bohlen of the Law Department of the University of Pennsylvania spoke on "Modern Tendencies in Legal Thought."

The officers of the New Orleans Bar Association for the year 1932 are: Herbert W. Kaiser, President; Charles J. Rivet, Vice-President; John May, Vice-President; Eugene D. Saunders, Vice-President; Frank W. Hart, Secretary, and Benjamin Y. Wolf, Treasurer.

The Southwest Kansas Bar Association held its fifteenth semi-annual meeting on Dec. 30, 1931 at Dodge City with large attendance though in very threatening weather. This association comprises more than one-fourth of the area of the state, being the southwest one-fourth with extensions eastward and northward. Attendance is always large. Only a few cities or counties have so large bar as to keep up good meetings, and this system of districts meets the situation. The Bar Association of Northwest Kansas has the northwestern twenty-six counties, taking the northwest one-fourth of the state less a small strip on the south that goes to the southwest Bar. The Northwestern Association also runs nearly or quite fifty miles east of the middle line of the state. J. C. R.

John L. Darrouzet, veteran member of the Galveston bar, was elected president of the Galveston Bar Association at the recent annual meeting, according to a newspaper of that city. Marion J. Levy was elected vice-president; Henry W. Flagg was re-elected secretary, and Herman E. Kleinecke Jr. was re-elected treasurer. The following directors were named for the ensuing year: Ballinger Mills, retiring president; Bryan F. Williams, Owen D. Barker, Charles J. Stubbs, H. C. Hughes.

"I hope to have every lawyer in Galveston a member of this bar association, and to create a spirit among lawyers that should exist in every community that has the proper sort of bar association," President Darrouzet said.

"I hope, also," he declared, "to have a meeting of all lawyers in Galveston to determine the attitude of the bar association on the self-governing bar bill."

The Fourteenth Judicial District (Minn.) Bar Association met at Crookston in January and chose the following new officers: President, J. E. Montague; Vice-President, John O'Brien; Treasurer, W. P. Murphy; Secretary, L. S. Miller.

At the annual meeting of the Delaware County (N. Y.) Bar Association held in Delhi on January 4th, officers were re-elected as follows: A. Lindsay O'Connor, President; Arthur G. Patterson, Vice-President; William H. Phelps, Secretary, and Fred W. Youmans, Treasurer.